Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA,
Petitioner,

—v.—

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DOCKET ENTRIES IN DISTRICT COURT

DATE	FILINGS—PROCEEDINGS	
2-18-64	Filed Libel and One copy	JS 5
2-18-64	Filed designation	
2-18-64	Issued Citation in Personam and 2 copies with one copy of Libel	ht
4- 7-64	Filed warrant of seizure and monition, certificate of publication, mailing of notice and Marshal's return of attachment	3.00 sb
6- 3-64	Filed Motion to Intervene	
6- 3-64	Leave given Donald Angelini to intervene and to file claim and answer—Decker, J. Mld. notices 6-4-64	
6- 3-64	Filed Claim of Owner	
6- 3-64	Filed Answer of Donnald Angelini, Claimant	P
1-12-65	Cause called for Report on Status and set for trial on Feb. 1, 1965 trail call.—Decker, J. mailed notices 1-13-65	h
1-21-65	On Motion of Defendant, cause taken off trial call of February 1, 1965 and reset to March 1, 1965 trial call.—Decker, J. mailed notices 1-22-65	h
3- 1-65	Cause removed from present trial call and reset to April 5, 1965 trial call.—Decker, J. mailed notices 3-2-65	h
4- 5-65	Cause removed from April 5, 1965 trial call and reset to May 3, 1965 trial call.—Decker, J. mailed notices 4-6-65	h
5- 3-65	Cause called for trial. On Motion of U.S., cause removed from May trial call and reset to June 7 trial.—Decker, J. mailed notices 5-4-65	h

DATE	FILINGS—PROCEEDINGS	
6- 7-65	Cause called for trial and contd. to June 21, 1965 at 10:00 a.m. for trial call—Decker, J. Mld. notices 6-8-65	P
6- 8-65	On Court's own motion order of June 7, 1965 hereby vacated and cause reset for trial on June 14, 1965 at 10:00 A.M. Decker, J. Mld. Ntcs. 6-9-65	E
6- 9-65	Motion defendant to reset trial date denied. Cause held for trial on June 14, 1965.—Decker, J. Mld ntcs. 6-10-65	ht
6-14-65	Cause called for trial and contd to June 15, 1965 at 2:00 P.M.—Decker, J. Mld Ntcs. 6-15-65	E
6-15-65	Cause called for trial. Opening statements made. Evidence heard in part on behalf of plaintiff and cause continued to June 16, 1965 at 10:00 a.m.—Decker, J. Mld ntcs. 6-16-65	ht
6-16-65	Filed Subpoena returned served on Reis Mitchel.	
6-16-65	Further evidence heard on behalf of Govt. Govt rests. Deft rests. Final arguments made. Govt to submit Proposed Findings and Supporting Brief in one week. Deft to submit answering Brief one week thereafter. Cause taken under advisement.—Decker, J. Mld. Notices 6-17-65.	R
6-24-65	On motion U.S., time in which to file brief is hereby extended to June 29, 1965—Decker, J. Mld 6-25-65	aim
6-29-65	Filed Memorandum in support of motion for judgment for libelant	aim
7-16-65	Filed Memorandum in support of motion for judgment for Claimant	v

DATE	FILINGS—PROCEEDINGS	
8-25-65	Enter Findings of Fact and Conclusions of Law. DRAFT Enter Judgment order. Respondent U.S. Coin & Currency forfeit in amount of $8,674.00 to United States. Further order U.S. Marshal turn over U.S. Coin & Currency in amount of $8,674.00 to District Director, Internal Revenue.—Decker, J.	2 DRAFTS
	Mld ntcs. 8-26-65	JS 6 ht
9-22-65	Filed Receipt of District Director of Internal Revenue at Chicago re currency in amount of $8,674.00	$3.00 ht
10-22-65	Filed Intervenor—Claimant's Notice of Appeal	
	Mailed copy of notice of appeal to U.S. Atty.	B
10-25-65	Filed Bond on appeal	B
11- 1-65	Filed Statement of appellee, pursuant to Rule 12(d) U.S. Court of Appeals, 7th Circuit.	B
11- 5-65	Filed Stipulation for diminution of the record on appeal	B
12- 1-65	Leave given for extension of time to docket and file record on appeal to January 10, 1966—Decker, J.	
	Mailed Notice 12-1-65	B
1- 5-66	Filed Government's exhibits 4 thru and including 19, in three binders	B
1-10-66	Clerk's file copy of transcript of proceedings had before the Honorable Bernard M. Decker, Judge on June 15, 16, 1965 filed by the Official Court Reporter	
1-10-66	Certified and transmitted record on appeal to U.S.C.A., 7th Circuit	B
8-29-67	Filed Mandate from U.S.C.A. 7th Circuit, it is ordered that the judgment of said District Court entered on August 25, 1965 is hereby AFFIRMED.	

DATE	FILINGS—PROCEEDINGS
8-29-67	Filed Opinion.
8-29-67	Received Mandate, Record, Exhibits and Opinion from U.S.C.A. for the Seventh Circuit. R
4-15-68	Filed certified copy of order entered April 9, 1968 by the U.S.C.A., 7th Circuit, IT IS HEREBY ORDERED that the mandate of this Court heretofore issued to the U.S. District Court for the Northern District of Illinois, Eastern Division, on August 18, 1967, be, and the same is hereby recalled. IT IS FURTHER ORDERED and adjudged by this Court that the judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division, entered in this cause be, and the same is hereby REVERSED, and this cause is hereby REMANDED to the District Court for the entry of an appropriate judgment for claimant-appellant, in accordance with the opinion of this court filed this day. JS 5 G
8- 8-68	Filed certified copy of order entered August 7, 1968 by the U.S. Court of Appeals, 7th Circuit, IT IS ORDERED that the clerk of the U.S. District Court for the Northern District of Illinois, Eastern Division, be authorized and directed to return the entire record on appeal to this Court and that after such recall of the record the Clerk of this Court is hereby authorized and directed to certify and transmit the said record to the Supreme Court of the United States as a part of the Government's application for writ of certiorari. G
8-15-68	Certified and transmitted entire previous record on appeal to the U.S.C.A., 7th Circuit, with the exception of Government's exhibits not now in the Clerk's office. G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 64C 295

UNITED STATES OF AMERICA, LIBELANT

-vs-

UNITED STATES COIN & CURRENCY
IN THE AMOUNT OF $8,674.00, RESPONDENTS

LIBEL

To the Honorable Judges of Said Court:

Now comes FRANK E. McDONALD, United States Attorney for the Northern District of Illinois, and presents the libel of the UNITED STATES OF AMERICA against aforesaid respondents and against all persons seeking to intervene in these proceedings for the purpose of claiming aforesaid respondents pursuant to 28 U.S.C. 1345 and 26 U.S.C. 7302.

For a cause of action the UNITED STATES OF AMERICA alleges upon information and belief:

1. From on or about August 1, 1963, until on or about August 24, 1963, within the jurisdiction of this Court, a business was being operated by Donald Angelini, in violation of 26 U.S.C. 4401, 4411, 4412, and 4901 without the owner, owners, operator, operators, conductor and conductors of this business having complied with the provisions of these sections of the United States Code.

2. On one or more of the aforementioned dates, within the jurisdiction of this Court, aforesaid respondents had been used and were intended to be used in violation of the Internal Revenue Laws of the United States of America.

3. On or about August 24, 1963, aforesaid respondents were seized, pursuant to 28 U.S.C. 7302 by agents of the

United States Treasury Department acting under the authority of the Secretary of the Treasury and are now in the possession and control of the Internal Revenue Service, United States Treasury Department.

4. By reason of the foregoing premises, this cause is within the admiralty jurisdiction of this Court, and by virtue thereof and by force of the Statutes hereinabove set forth aforementioned respondents became forfeit and are forfeited to the United States of America.

WHEREFORE, FRANK E. McDONALD, United States Attorney for the Northern District of Illinois, who presents this action on behalf of the UNITED STATES OF AMERICA, prays as follows:

1. That process in due form of law according to the practice of this Court in admiralty causes may issue, citing all persons having or claiming an interest in aforesaid respondents to appear and answer this libel.

2. That aforesaid respondents be adjudged and decreed forfeited to the UNITED STATES OF AMERICA.

3. That the UNITED STATES OF AMERICA have such other and further relief as may be just in the premises.

FRANK E. McDONALD
United States Attorney
Proctor for Libelant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

CLAIM OF OWNER

Now comes DONALD ANGELINI, owner in law of $8,674.00 in United States Coin and Currency, that is the subject matter of this case, and makes claim to the said $8,674.00 in United States Coin and Currency now being held and detained by Agents of the United States Treasury Department and under the control of the Internal Revenue Service, and the said Claimant avers that he is the true and bona fide lawful owner of said coin and currency, and was such at the time of the seizure thereof.

WHEREFORE, DONALD ANGELINI prays to defend accordingly.

DONALD ANGELINI

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

ANSWER OF DONALD ANGELINI, CLAIMANT

Now comes DONALD ANGELINI, Claimant, by his proctor, Richard E. Gorman, and files this his Claim and Answer to the Libel and Complaint of the United States of America against United States coin and currency in the amount of $8,674.00, and, answering upon information and belief, says:

1. He denies the allegations of paragraph 1 of the Libel.

2. He denies that on any of the dates mentioned in the Libel, within the jurisdiction of this Court, the respondent had been used and was intended to be used in violation of the Internal Revenue Laws of the United States of America.

3. He admits that on or about August 24, 1963, the aforesaid respondent was seized by agents of the United States Treasury Department and is now in the possession and control of the Internal Revenue Service but denies the aforesaid respondent was legally seized under any color of law or regulation.

4. He admits that the cause is within the jurisdiction of this Court by virtue and by force of the Statutes of the United States in this Libel referred to but denies that the aforesaid respondent, or any part thereof, became or is forfeited to the United States of America, but on the contrary avers and states that the same respondent as aforesaid is and constitutes the property of the Claimant, DONALD ANGELINI.

WHEREFORE, this Claimant prays this Honorable Court will dismiss the Libel aforesaid and enter its order directing the return of the $8,674.00 in United States currency and coin, and the entirety thereto to this Claimant and that the Libelant herein be condemned with cost.

RICHARD E. GORMAN
Proctor for Claimant,
One North LaSalle Street,
Chicago 2, Illinois
Phone—Central 6-7722

[Jurat Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 64 C 295

UNITED STATES OF AMERICA, LIBELANT

vs.

UNITED STATES COIN & CURRENCY
IN THE AMOUNT OF $8,674.00, RESPONDENT

and

DONALD ANGELINI, INTERVENOR-CLAIMANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This Court has jurisdiction of the subject matter and of the parties.
2. From on or about August 1, 1963, until on or about August 24, 1963, there was being operated and conducted a bookmaking business at Sportsman's Park, Cicero, Illinois.
3. This bookmaking business was being operated and conducted without payment of the occupational tax of $50.00 as required by 26 U.S.C. 4411, and without registration with the District Director of Internal Revenue as required by 26 U.S.C. 4412.
4. This wagering business was thus being operated and conducted in violation of 26 U.S.C. 4901.
5. Respondent, United States Coin & Currency in the Amount of $8,674.00 was being used in this bookmaking business, and was an integral part thereof.
6. On August 24, 1963, Agents of the Internal Revenue Service, United States Treasury Department, acting under the control and direction of the District Director of Internal Revenue, United States Treasury Department, Chicago, Illinois, and under the authority of the Secretary of the Treasury, seized and took possession of aforesaid respondent.

7. Aforesaid respondent had been used and was intended to be used in violation of the provisions of the Internal Revenue laws in that respondent was being used in a bookmaking business.

Conclusions of Law

1. This Court has jurisdiction of the subject matter and of the parties.
2. Respondent, United States Coin & Currency in the Amount of $8,674.00 was being used in a bookmaking business operated and conducted at Sportsman's Park, Cicero, Illinois.
3. Respondent, United States Coin & Currency in the Amount of $8,674.00 is property which had been used and was intended to be used in violation of the provisions of the Internal Revenue laws.
4. Donald Angelini has no property rights in and to aforesaid respondent. No other persons having appeared or having filed any claims in this proceeding, default judgment is hereby entered against them.
5. Respondent, United States Coin & Currency in the Amount of $8,674.00 is forfeited to the United States of America as provided by 26 U.S.C. 7302.

Enter:

/s/ Bernard M. Decker
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 64 C 295

UNITED STATES OF AMERICA, LIBELANT

vs.

UNITED STATES COIN & CURRENCY
IN THE AMOUNT OF $8,674.00, RESPONDENT

and

DONALD ANGELINI, INTERVENOR-CLAIMANT

JUDGMENT ORDER

This cause having come on to be heard for trial before the Court, without a jury, and the United States of America having appeared by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and the claimant, Donald Angelini, by Richard E. Gorman his attorney, and the Court having jurisdiction, and in accordance with its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

IT IS HEREBY ORDERED that respondent, United States Coin & Currency in the Amount of $8,674.00, be and the same is hereby forfeited to the United States of America;

IT IS FURTHER ORDERED that the United States Marshal turn over aforesaid United States Coin & Currency in the Amount of $8,674.00 to the District Director of Internal Revenue, Chicago, Illinois.

Judgment is hereby entered accordingly.

ENTER:

/s/ BERNARD M. DECKER
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM 1966—APRIL SESSION 1967

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE

v.

UNITED STATES COIN & CURRENCY
IN THE AMOUNT OF $8,674.00, RESPONDENT,

DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

June 27, 1967

Before KILEY, FAIRCHILD and CUMMINGS,
Circuit Judges.

CUMMINGS, *Circuit Judge.* In this libel, the respondent money was seized under Section 7302 of the Internal Revenue Code (26 USC § 7302) on the ground that it was being used in violation of the internal revenue laws. The money was seized from the person of Donald Angelini on August 24, 1963. In August 1963, Angelini was engaged in the business of accepting wagers at Sportsman's Park racetrack in Cicero, Illinois. His 1964 conviction for failing to pay the special occupational tax on wagers and for failing to register with the District Director of Internal Revenue (26 USC §§ 4411 and 4412) was affirmed by this Court in *United States* v. *Angelini*, 346

F.2d 278 (7th Cir. 1965), certiorari denied, 382 U.S. 838. In that case, the evidence was summarized as follows (346 F.2d at p. 280):

> "on a number of occasions during the month of August 1963 the defendant was observed at Sportsman's Park, a Cicero, Illinois, race track, receiving money from persons with whom the government agents had placed wagers on the horse races being run. On these occasions he was observed making notations. A search, subsequent to his arrest at the track, revealed he had $8,674.00 on his person and documents identified by an expert witness as 'recap sheets' showing [illegible]n or loss for wagering operations at the end [illegible]v particular race. On one of these sheets a col[illegible] figures designated by the letter 'R' corresponded exactly with a record of wagers seized from Joe 'Red' Altiere at the time of the latter's arrest. Altiere was one of the individuals with whom the government agents had placed wagers and who had been observed handling money to the defendant." [1]

Here the District Court found that the $8,674 was being used in this bookmaking business in violation of the internal revenue laws and consequently ordered forfeiture. On appeal, it is contended that the evidence was insufficient to sustain the judgment of forfeiture and that the underlying statutory provisions violate the self-incrimination clause of the Fifth Amendment.

In the prior *Angelini* case, the $8,674 found on claimant at the time of his arrest was an important link in the Government's evidence and one of the factors justifying an inference that he was engaged in the business of accepting wagers. Since the possession of the $8,674 was one of the elements supporting Angelini's conviction, he may be collaterally estopped from denying that the respondent money was an integral part of the bookmaking business being used in violation of the internal revenue laws. Cf. *Emich Motor Corporation* v. *General Motors*

[1] Altiere's wagering tax conviction was also affirmed. *United States* v. *Altiere*, 343 F.2d 115 (7th Cir. 1965), remanded, 382 U.S. 367.

Corp., 340 U.S. 558, 568-569. But even apart from the doctrine of collateral estoppal, an inference that this money was being used in illegal wagering was justified from the evidence in the forfeiture case itself. This record shows that Angelini was responsible for paying off bets, taken by other members of the bookmaking ring. His "recap sheets" indicate that the dollar volume of this business was substantial. Angelini would obviously need enough money on hand to pay off the betting customers. As noted in *United States* v. *$2117.41*, 218 F.Supp. 351, 353 (W.D. Mo. 1963):

> "A sufficient amount of ready cash to meet the demands of the trade would appear to be a necessary and closely related implement or facility of the wagering business as here transacted on the streets and in public rooms of hotels." [2]

Under this ready cash theory, it was unnecessary for the Government to show that the respondent money was actually received by Angelini from bettors on August 24, 1963, the date of seizure.

In our view the Government made out a *prima facie* case before the District Court. It was reasonable to conclude from the "recap sheets" and other evidence that Angelini was participating in a bookmaking operation when arrested. The unusually large amount of cash scattered throughout his pockets was vital to his part in the wagering operation. Here the burden of persuasion had shifted to claimant. By standing mute, he failed to discharge that burden. His silence was strong confirmation of the charges. *Local 167* v. *United States*, 291 U.S. 293, 298; *Stagner* v. *United States*, 197 F.2d 992, 994 (5th Cir. 1952). Although claimant now complains that some of this money may not have been used in his wagering business, he had ample opportunity to take the stand to explain what portion of the $8,674 was not so used.

The judgment below was based on two provisions of the wagering statutes requiring registration and payment of an occupational tax. The claimant urges that those provisions, namely, Sections 4411 and 4412 of the Inter-

[2] See also *United States* v. *$4298.80*, 179 F.Supp. 251, 254 (D.Md. 1959).

nal Revenue Code (26 USC §§ 4411 and 4412), violate the privilege against self-incrimination contained in the Fifth Amendment. Knowing that the Supreme Court was reconsidering this question, we withheld releasing this opinion pending the outcome of *Marchetti* v. *United States*, 385 U.S. 1000, and *Grosso* v. *United States*, 385 U.S. 810. However, at the close of its last Term, the Supreme Court restored those two cases to the docket for reargument during its October 1967 Term. Rather than delay this litigation further, we reject claimant's constitutional argument on the authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419; but cf. *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70.

The other points raised by claimant were disposed of in this Court's earlier *Angelini* opinion, and we decline to depart therefrom.

The judgment of the District Court is affirmed.

A true Copy:

Teste:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM 1967—APRIL SESSION 1968

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE

v.

UNITED STATES COIN & CURRENCY
IN THE AMOUNT OF $8,674.00, RESPONDENT,

DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

April 9, 1968

Before KILEY, FAIRCHILD and CUMMINGS,
Circuit Judges.

PER CURIAM. When our opinion was released herein, the Supreme Court had not yet decided *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, so that we decided claimant's constitutional argument on the authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. See 379 F.2d 946.

After the Supreme Court's opinions were announced in the *Marchetti* and *Grosso* cases, certiorari was granted and our judgment was vacated. ..... U.S. ..... *Grosso* does not involve Sections 4411 and 4412 of the Internal Revenue Code, the provisions involved here. In *Marchetti*, the Court concluded with this admonition (390 U.S. at p. 61):

> "We emphasize that we do not hold that these wagering tax provisions [26 U.S.C. §§ 4411 and 4412] are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be *criminally* punished for failure to comply with their requirements." (Emphasis supplied.)

Because this is not a criminal case in which an individual's liberty is at stake, there is a question as to whether *Marchetti* is applicable.

The respondent monies were declared forfeit pursuant to 26 U.S.C. § 7302, which provides that "no property rights shall exist in * * * property" used "in violating the provisions of the internal revenue laws." The only provisions of the internal revenue laws which can support forfeiture here are 26 U.S.C. §§ 4411 and 4412.*

Marchetti holds that compliance with §§ 4411 and 4412 subjects the taxpayer to

> " 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination" (390 U.S. at p. 48).

Claimant Angelini would have subject himself to exactly the same hazards by complying. In this respect, *Marchetti* and this case are the same. But the consequences of noncompliance are not the same in the two cases. The prospect of a felony conviction involved in *Marchetti* of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of *Boyd* v. *United States*, 116 U.S. 616, is controlling. *Boyd* was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and

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* The applicability of 26 U.S.C. § 4901, which was cited by the District Court, is dependent solely on the §§ 4411 and 4412 violations. Therefore, it need not be considered separately.

Fifth Amendments. See *Garrity* v. *New Jersey*, 385 U.S. 493, 496-497, which reaffirms and follows *Boyd*.

The only apparent purpose of 26 U.S.C. § 7302, as applied here, is to punish violators of Sections 4411 and 4412 of the Internal Revenue Code by taking away money used in committing the violations. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700. As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture.

Accordingly, the judgment of the District Court is reversed and the cause is remanded for the entry of an appropriate judgment for claimant-appellant.

A true Copy:

Teste:

• • • •

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, April 9, 1968

Before

HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE

vs.

UNITED STATES COIN & CURRENCY
IN THE AMOUNT OF $8,674.00, RESPONDENT

and

DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

This appeal now comes before the Court subsequent to the filing of the judgment of the Supreme Court of the United States vacating the previous judgment entered by this Court on June 27, 1967, and remanding this cause to this Court for further consideration.

IT IS HEREBY ORDERED that the mandate of this Court heretofore issued to the United States District Court for the Northern District of Illinois, Eastern Division, on August 18, 1967, be, and the same is hereby recalled.

IT IS FURTHER ORDERED and adjudged by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered in this cause be, and the same is hereby REVERSED, and this cause is hereby REMANDED To the said District Court for the entry of an appropriate judgment for claimant-appellant, in accordance with the opinion of this Court filed this day.

SUPREME COURT OF THE UNITED STATES

No. 477, October Term, 1968

UNITED STATES, PETITIONER

v.

UNITED STATES COIN AND CURRENCY, ETC.

ORDER ALLOWING CERTIORARI—Filed November 18, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 328926 390

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00, DONALD ANGELINI, CLAIMANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit, entered on April 9, 1968.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra,* pp. 11–13) is reported at 393 F. 2d 499. An earlier opinion of the court of appeals in this case is reported at 379 F. 2d 946.[1]

[1] That judgment was vacated by this Court and the case remanded for further consideration, along with *Stone* v. *United States*, 390 U.S. 204.

318-221—68——1

JURISDICTION

The judgment of the court of appeals (App. B, pp. 14-15) was entered on April 9, 1968. On June 20, 1968, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, prohibiting the criminal prosecution of individuals who properly assert the privilege against self-incrimination as a ground for non-compliance with the registration and return requirements of the federal wagering tax laws, extend to forfeiture proceedings directed against property used in violation of the same statutory provisions.

2. Whether, in any event, the new constitutional rule adopted in *Marchetti* and *Grosso* should be held to control forfeiture proceedings instituted prior to the date those cases were decided.

STATUTE INVOLVED

26 U.S.C. 7302 provides, in pertinent part:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. * * *

STATEMENT

In 1964 Donald J. Angelini was convicted in the United States District Court for the Northern District of Illinois for failure to register as a person engaged in the business of wagering and to pay the related occupational tax (26 U.S.C. 4411, 4412).[2] Following his conviction, a sum of $8,674, which he was carrying on his person at the time of his arrest, was forfeited under 26 U.S.C. 7302, as property intended for use in violation of the wagering tax laws. On appeal from the judgment of forfeiture, Angelini challenged the constitutional validity of the underlying wagering tax laws on the ground that they violated his privilege against self-incrimination. While the Seventh Circuit recognized that this constitutional issue was at that time pending before this Court in the *Marchetti* and *Grosso* cases (Nos. 2 and 12, 1967 Term), it affirmed the judgment of forfeiture, relying on the then-controlling authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419 (*Angelini* v. *United States*, 379 F. 2d 946).

Thereafter, on January 29, 1968, this Court held in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, that individuals who properly assert the privilege against self-incrimination as a basis for failure to comply with the registration, occupational tax, and excise tax requirements of the wagering tax laws (26 U.S.C. 4401, 4411, 4412)

[2] That conviction was upheld in *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838.

may not be criminally prosecuted for such non-compliance. Subsequently, the Court granted the petition for a writ of certiorari which had, in the interim, been filed by petitioner (No. 798, 1967 Term), vacated the judgment of forfeiture and remanded the case to the court of appeals for reconsideration in light of the *Marchetti-Grosso* holdings (390 U.S. 204).

Following reconsideration, the Seventh Circuit, although noting that "this is not a criminal case in which an individual's liberty is at stake" (App. A, p. 12), determined that forfeiture cases such as the instant one were nonetheless governed by the *Marchetti-Grosso* rationale. Accordingly, it reversed the district court's award of judgment in favor of the government (App. A, p. 13; 393 F. 2d at 500).

REASONS FOR GRANTING THE WRIT

The decision below represents an extension of the *Marchetti-Grosso* rationale beyond its express terms and is in direct conflict with a recent decision of the Sixth Circuit. Moreover, without any discussion of the matter, the court below applied the *Marchetti-Grosso* decisions retroactively. Serious questions are thus raised concerning the proper enforcement of the internal revenue laws with regard to forfeiture proceedings which, in our view, justify review by this Court.

1. The *Marchetti-Grosso* decisions did not hold the wagering tax laws unconstitutional. In the concluding paragraph of the *Marchetti* opinion, the Court stated (390 U.S. at 61):

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. * * *

Accordingly, a person who engages in the business of accepting wagers remains in violation of the wagering tax laws if he fails to register or pay the prescribed taxes. Although he cannot be punished criminally for such non-compliance, the occupational and excise taxes can still be collected in a civil proceeding.[3] We submit that it is equally consistent with the rationale of *Marchetti-Grosso* that property used in violation of those provisions is forfeitable under 26 U.S.C. 7302.

In the instant case the court reasoned that since violations of the wagering tax laws may no longer be punished directly, "[i]t follows that they should not be punished indirectly through forfeiture" (App. A, p. 13). The court overlooked, however, that proof that the property was intended for use in wagering depends on evidence apart from any required declaration in connection with payment of the prescribed taxes, and that it is immaterial whether the person whose property is seized for such use is the one who

[3] Indeed, in the *Grosso* opinion the Court explicitly noted that it was not holding "either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation," but "only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax" (390 U.S. at 70, n. 7).

must pay the taxes. Forfeiture proceedings are *in rem*, not *in personam*, in character, and are directed against the offending property, not an individual. In short, the court failed to recognize the peripheral relationship of the personal privilege against self-incrimination to proceedings to forfeit property.[4]

The decision below squarely conflicts with that of the Sixth Circuit in *United States* v. *One 1965 Buick*, 392 F. 2d 672 (Appendix C, *infra*, pp. 15–21), in which a petition for rehearing was denied on July 19, 1968 (Appendix D, *infra*, pp. 22–24). In that case the Sixth Circuit held that the government could properly forfeit some $305,633 used by the claimants in violation of the wagering tax laws even though a criminal prosecution for the violation of such provisions would be barred by a proper claim of privilege. In reaching this result the Sixth Circuit relied upon the civil nature of forfeiture proceedings and the explicit statements in *Marchetti* and *Grosso* that the wagering tax statutes were constitutional (App. C, pp. 18–20). It interpreted *Marchetti* and *Grosso* as holding only that *criminal prosecutions* under such statutes were barred by the proper assertion of the Fifth Amendment privilege (App. C, p. 19).

---

[4] Neither *Boyd* v. *United States*, 116 U.S. 616, nor *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, relied upon by the court of appeals (App. A, p. 13), requires the result it reached. In each of those cases the effort to sustain the forfeiture involved an affirmative violation of a constitutional protection—in the *Plymouth* case by the use, in the forfeiture proceedings, of illegally obtained evidence, and in *Boyd* by requiring the production of allegedly incriminating private papers under a statute which permitted judgment against the defendant for failure to comply.

As a consequence of these two conflicting interpretations, considerable uncertainty has been created in the administration of the internal revenue laws with regard to forfeitures of property used in violation of the wagering tax laws, and, moreover, to forfeitures generally. Not only is the question presented an important one, but the present confusion for enforcement officials and those subjected to forfeitures is of sufficient magnitude to warrant resolution. Only this Court can provide a definitive resolution of the existing conflict, particularly since the issue involved turns on a proper construction of this Court's *Marchetti-Grosso* decisions. Accordingly, plenary consideration in the instant case seems appropriate.

2. Apart from the conflict among circuits, this case also raises a substantial question regarding retroactivity, since the court below, without discussion, applied *Marchetti-Grosso* to forfeiture proceedings instituted before those cases were decided. Thus, even if this Court were to decide that the *Marchetti-Grosso* rationale applied to forfeitures, the question would still remain as to whether those decisions should be given retrospective application to cases in the courts on the date when the *Marchetti-Grosso* decisions were rendered.

As recent decisions of this Court have established, where a newly adopted constitutional rule does not bear on the integrity of the guilt-determining process, its retroactivity *vel non* should turn upon considerations relating to the purpose to be served by the new rule, governmental reliance upon the prior rule, and the effect upon the administration of justice if the

new rule were held to control pending cases. *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293; *DeStefano* v. *Woods*, No. 559, 1967 Term (decided June 17, 1968, together with *Carcerano* v. *Gladden*, No. 941, 1967 Term); cf. *Roberts* v. *Russell*, No. 920 Misc., 1967 Term (decided June 10, 1968). In our view, these considerations militate against a rule of retroactivity with regard to forfeiture proceedings arising out of wagering tax violations.

In seizing property used in violation of the internal revenue laws, government agents have obviously relied upon the prior decisions of this Court specifically upholding the validity of the wagering tax statutes. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419. Moreover, the new rule adopted in *Marchetti-Grosso* would not be measurably furthered by a retroactive application of those decisions to forfeiture cases. The evident purpose of the *Marchetti-Grosso* holdings is to prevent the criminal prosecution of individuals who, because of the risk of incrimination that compliance with the wagering tax laws would entail, have failed to comply with those provisions. Forfeiture proceedings are directed against property, not people. And, as already noted, proof of wagering warranting forfeiture is independent of proof of non-payment of the prescribed taxes. While non-payment must be shown, proof that the owner of the property was himself the person liable for the taxes is not necessarily required. In short, the impact of a forfeiture on the

privilege against self-incrimination is at most collateral and indirect.

We have not urged the non-retroactivity of *Marchetti-Grosso* with respect to criminal prosecutions which had not yet become final at the time those decisions were rendered. We believe, however, that a different result is justified in forfeiture proceedings where no individual is charged with crime and no criminal conviction results. In such circumstances, neither the purpose underlying *Marchetti-Grosso* nor the proper administration of justice would be served by giving those decisions retroactive effect in pending cases.

CONCLUSION

The decision below raises serious questions concerning the enforcement of the internal revenue laws with regard to forfeitures which we believe require resolution by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1968.

318-221—68——2

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1967 APRIL SESSION, 1968

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00, RESPONDENT

DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 9, 1968

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges.*

PER CURIAM. When our opinion was released herein, the Supreme Court had not yet decided *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, so that we decided claimant's constitutional argument on the authority of *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419. See 379 F. 2d 946.

After the Supreme Court's opinions were announced in the *Marchetti* and *Grosso* cases, certiorari was granted and our judgment was vacated. U.S. *Grosso* does not involve Sections 4411 and 4412 of the Internal Revenue Code, the provisions involved here. In *Marchetti,* the Court concluded with this admonition (390 U.S. at p. 61):

> "We emphasize that we do not hold that these wagering tax provisions [26 U.S.C. §§ 4411 and 4412] are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be *criminally* punished for failure to comply with their requirements." (Emphasis supplied.)

Because this is not a criminal case in which an individual's liberty is at stake, there is a question as to whether *Marchetti* is applicable.

The respondent monies were declared forfeit pursuant to 26 U.S.C. § 7302, which provides that "no property rights shall exist in * * * property" used "in violating the provisions of the internal revenue laws." The only provisions of the internal revenue laws which can support forfeiture here are 26 U.S.C. §§ 4411 and 4412.[1]

Marchetti holds that compliance with §§ 4411 and 4412 subjects the taxpayer to

> "'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination" (390 U.S. at p. 48).

Claimant Angelini would have subjected himself to exactly the same hazards by complying. In this respect, *Marchetti* and this case are the same. But the consequences of noncompliance are not the same in

[1] The applicability of 26 U.S.C. § 4901, which was cited by the District Court, is dependent solely on the §§ 4411 and 4412 violations. Therefore, it need not be considered separately.

the two cases. The prospect of a felony conviction involved in *Marchetti* of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of *Boyd* v. *United States*, 116 U.S. 616, is controlling. *Boyd* was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments. See *Garrity* v. *New Jersey*, 385 U.S. 493, 496–497, which reaffirms and follows *Boyd*.

The only apparent purpose of 26 U.S.C. § 7302, as applied here, is to punish violators of Sections 4411 and 4412 of the Internal Revenue Code by taking away money used in committing the violations. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700. As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture.

Accordingly, the judgment of the District Court is reversed and the cause is remanded for the entry of an appropriate judgment for claimant-appellant.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Seventh Circuit

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE,

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00, RESPONDENT AND DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Tuesday, April 9, 1968

Before ROGER J. KILEY, THOMAS E. FAIRCHILD and WALTER J. CUMMINGS, *Circuit Judges.*

This appeal now comes before the Court subsequent to the filing of the judgment of the Supreme Court of the United States vacating the previous judgment entered by this Court on June 27, 1967, and remanding this cause to this Court for further consideration.

It is hereby ordered that the mandate of this Court heretofore issued to the United States District Court for the Northern District of Illinois, Eastern Division,

on August 18, 1967, be, and the same is hereby recalled.

It is further ordered and adjudged by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered in this cause be, and the same is hereby reversed, and this cause is hereby remanded to the said District Court for the entry of an appropriate judgment for claimant-appellant, in accordance with the opinion of this Court filed this day.

APPENDIX C

No. 17559

United States Court of Appeals
Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ONE 1965 BUICK, ETC. ET AL., DEFENDANTS

WILBUR DEAN AND DELORES DEAN, CLAIMANTS-APPELLANTS

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

Decided April 17, 1968

Before WEICK, *Chief Judge*, and EDWARDS and MCCREE, *Circuit Judges*.

WEICK, *Chief Judge*.

This appeal involves questions arising out of the forfeiture of property used in the operation of a numbers business, in violation of the Internal Revenue laws.

The United States filed a libel of information in the District Court to condemn the property which consisted of $305,633.25 in cash, a package contain-

ing an unknown amount of currency, three Buick automobiles, and three adding machines.

The property had been seized by Special Agents of the Internal Revenue Service in a search of the residence of appellants, Wilbur and Delores Dean, pursuant to the authority of search warrants which authorized the search of the residence and four automobiles.

The libel alleged that the Deans and other persons engaged in and carried on the business of accepting wagers without having first paid the special occupational tax imposed on such business, and without registering the business as required by law[1]; that while so engaged said property was used and was intended for use in violation of the Internal Revenue laws; and that by reason thereof, said property became and is the property of the United States under the provisions of Section 7302 of Title 26, U.S.C.

Appellants filed answers, denying the material allegations of the libel. They also filed a claim to the property. Wilbur Dean filed a motion to suppress, the ground of the motion to suppress being that the search and seizure were illegal, in violation of his Fourth and Fifth Amendment rights.

---

[1] The applicable statutory provisions are as follows:

26 U.S.C. § 4411 provides in pertinent part:

"There shall be imposed a special tax of $50 per year to be paid by each person who * * * is engaged in receiving wagers * * *"

26 U.S.C. § 4412 provides in part:

"Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district— * * *"

26 U.S.C. § 4901 provides in pertinent part:

"No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 * * * until he has paid the special tax therefor."

Pursuant to a stipulation of the parties, the motion to suppress and the trial of the libel were heard together. The trial lasted eight days, at the conclusion of which the District Judge delivered his opinion, which is contained in eleven pages of the printed record. He adopted findings of fact and conclusions of law. He found that the allegations contained in the libel were sustained by the evidence, and ordered the property condemned by decree of forfeiture and turned over to the United States. He denied the motion to suppress.

It is contended on appeal that the federal wagering tax statutes which formed the basis for issuance of the search warrants and seizure of the property sought to be forfeited, are unconstitutional.

An analysis of this claim must begin with the forfeiture statute itself. 26 U.S.C. § 7302 provides in part:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws * * * and no property rights shall exist in any such property."

The primary purpose of the statute is the protection of the revenue through the effective enforcement of the revenue laws. *Florida Dealers & Growers Bank* v. *United States*, 279 F. 2d 673, 676 (5th Cir. 1960); *United States* v. *One 1950 Ford Half-Ton Pickup Auto Truck, etc.*, 195 F. 2d 857, 859 (6th Cir. 1952); *United States* v. *Windle*, 158 F. 2d 196, 199 (8th Cir. 1946). A reading of the language of the statute, in the light of the purpose for its existence, leads to the conclusion that it outlaws any property used or intended for use inviolating the Internal Revenue laws and sanctions forfeiture thereof. However, if the wagering tax statutes are unconstitutional, as the

appellants insist, then there would be no revenue law violation upon which to predicate the forfeiture.

When the case was tried in the District Court it was governed by two decisions of the Supreme Court, which upheld the constitutionality of the wagering statutes here involved. *Lewis* v. *United States,* 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475 (1955) and *United States* v. *Kahriger,* 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 (1953). Shortly before the appeal was argued, the Supreme Court decided *Marchetti* v. *United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889 (1968) and *Grosso* v. *United States,* 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed 2d 906 (1968), in which convictions for violating the wagering statutes were set aside because they were in violation of the accused's Fifth Amendment privilege against self-incrimination.

Appellants rely on these decisions and contend that since they cannot be convicted on a criminal charge for violation of the wagering statutes if they assert their privilege against self-incrimination, their property ought not be subject to forfeiture for the same violation. In our judgment this does not follow.

The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax.

There can be no question but that Congress has power to tax unlawful activities. The fact that a business is unlawful does not exempt it from payment of taxes. *United States* v. *Sullivan,* 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

The Supreme Court in *Marchetti* did not hold that the wagering tax statutes as such were unconstitutional. The Court endeavored to make crystal clear that Congress had the constitutional power to enact such legislation. In *Marchetti,* the Court said:

> "The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases."

In *Marchetti* the Court further said:

> "We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful.
>
> "* * * Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.
>
> "* * * We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Finally, appellants' contention is explicitly answered by the Supreme Court in *Grosso,* where the Court stated in footnote 7:

> "Section 4411 provides that the occupational tax must be paid 'by each person who is liable for tax under section 4401' and by each person who receives wagers for one liable under § 4401. It might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense to a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. We cannot accept such an argument. We do not hold today either that the excise tax is as

such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax."

* * * * *

Affirmed.

APPENDIX D

No. 17559

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ONE 1965 BUICK, ETC., ET AL., DEFENDANTS

WILBUR DEAN AND DELORES DEAN,
CLAIMANTS-APPELLANTS

On Petition for Rehearing.

Decided July 19, 1968.

Before WEICK, *Chief Judge*, EDWARDS and MCCREE, *Circuit Judges*.

WEICK, *Chief Judge*. Appellants ground their petition for rehearing on *Angelini* v. *United States*, F. 2d (7th Cir. 1968).

We consider *Grosso* and *Marchetti* in a different "light" than did the Seventh Circuit. As we pointed out in our opinion, the Supreme Court limited its holding to criminal cases. The Court approved its previous decisions in *License Tax Cases*, 72 U.S. 462 (5 Wall) (1866), and *United States* v. *Sullivan*, 274 U.S. 259 (1927), which upheld the power of Congress

to tax unlawful activities. It is not for us to extend *Grosso* and *Marchetti* to civil cases and thereby exempt from taxation persons who derive their income from unlawful activities because they assert their Fifth Amendment rights in a criminal case. There is such a thing as an obligation to pay the excise tax. Even though such a person may not be convicted for criminal violation, because of exclusionary rules of evidence, he still remains civilly liable for the tax.

The statute (26 U.S.C. § 7302) makes it unlawful to have or possess any property intended for use in violating the internal revenue laws, and no property rights exist in such property. The forfeiture action is in rem against the property so used. *Various Items v. United States*, 282 U.S. 577 (1931).

The evidence disclosed a large-scale numbers operation by the Deans using their residence as a "bank" and "clearing house". The "bank" consisted of wagers placed by bettors with the Deans and was a fund amounting to $305,632.25 in cash available to pay off the winners.

Mr. Dean told the agents, as the District Court found, that he was the banker and he did not pay the occupational tax or the ten percent excise tax. He gave as a reason for not paying the excise tax that he could not afford to pay it because it came off the top. The court further found that the funds in the "bank" did not belong to the Deans but were merely gambling money in their custody.

The District Court found that the property seized was intended to be used and was used in violation of the internal revenue laws. There was abundant evidence to support this finding and it justified the order of forfeiture. Lotteries are also prohibited by the Constitution of Ohio and Ohio statutes which impose

criminal penalties for engaging in such activities. Art. XV § 6 Const. of Ohio; Ohio Rev. Code ch. 2915 (1953).

We do not regard *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), as apposite. It involved a search without a warrant which the state court determined was without probable cause. The forfeiture there depended upon the admission of illegally obtained evidence in violation of the Fourth Amendment as applied to the state by the Fourteenth Amendment. In the present case, the arrest was lawful and the search was pursuant to the authority of warrants which we have held to be valid. No illegally obtained evidence was admitted in the forfeiture proceeding. It is not necessary that there be a criminal conviction in order to support the forfeiture. *Various Items* v. *United States, supra; cf. Murphy* v. *United States*, 272 U.S. 630 (1926).

In any event, the property forfeited was found to be contraband and appellants are not entitled to have it returned to them. *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Trupiano* v. *United States*, 334 U.S. 699 (1948); *United States* v. *One Ford Coupe*, 272 U.S. 321 (1926); *United States* v. *Deane Hill Country Club, Inc.*, 342 F.2d 794 (6th Cir.), cert. denied, 381 U.S. 937 (1965); *United States* v. *$1,058.00 in United States Currency*, 323 F.2d 211 (3rd Cir. 1963).

We do not believe that the District Court should be required to determine the beneficial owners of the "bank" whose wagers constituted the fund available for pay-offs. The agents seized no money or property of the Deans which was not intended for use or used in violating the internal revenue laws.

The petition for rehearing is denied.

U.S. GOVERNMENT PRINTING OFFICE: 1966

No. 55

OCT 2 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $3,674,

and

DONALD J. ANGELINI,

Claimant-Respondent.

BRIEF FOR CLAIMANT-RESPONDENT IN OPPOSITION

ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-8881

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674,

and

DONALD J. ANGELINI,
Claimant-Respondent.

BRIEF FOR CLAIMANT-RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 393 F. 2d 499.

JURISDICTION

The judgment of the Court of Appeals (App. B, pp. 14-15) was entered on April 9, 1968. On motion of the petitioner timely filed, Mr. Justice Marshall of this Court extended time for filing the Petition herein to September 6, and said Petition was duly filed on September 4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether persons asserting the privilege against self-incrimination as a ground for non-compliance with the registration and return requirements of Title 26, U.S.C., §4411 and §4412, which statutes have been found constitutionally unenforceable in their present form, can be penalized therefor in a quasi-criminal forfeiture proceeding.

2. Whether compelling reasons exist for not giving effect on this direct appeal to the change in law recognized by this Court in *Marchetti* v. *United States*, 390 U.S. 39 and *Grosso* v. *United States*, 390 U.S. 62.

3. Whether there is any true conflict between the Sixth Circuit in *United States* v. *One 1965 Buick, etc., et al.* (Pet. App. C-D, pp. 16-24) and this cause.

STATUTE INVOLVED

26 U.S.C. 7302 provides, in pertinent part:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. * * *"

STATEMENT OF THE CASE

On February 18, 1964, a libel was filed herein seeking to forfeit the respondent, $8,674.00, stating as a cause of action that from about August 1 to August 24, 1963, one Donald Angelini was operating a business in violation of Title 26, U.S.C., Section 4401, 4411, 4412, and 4901, and that on one or more of those dates between August 1 and August 24, 1963, the respondent monies had been used or were intended to be used in violation of the Internal Revenue Laws of the United States. It was further alleged in said libel that on August 24, 1963, the respondent monies were seized by agents of the United States Treasury Department. (A. 6)

On or about June 3, 1964, leave was given to Donald Angelini to intervene and file his claim and answer, which he did, claiming ownership of the respondent monies, and, answering the libel, admitted the seizure of the respondent monies from his person, and substantially denied all other allegations, including that the monies were forfeit to the United States of America. (A. 2)

On June 15 and 16, 1965, the case was heard by the Honorable Bernard M. Decker, sitting without a jury, and taken under advisement. (A. 3-4, 8-39)

On August 25, 1965, the Court entered its written Findings of Fact and Conclusions of Law and Judgment Order declaring the respondent monies forfeit to the District Director of Internal Revenue. (A. 40-42)

In essence the court found that from August 1 to 24 of 1963, there was being operated and conducted a bookmaking business in Sportman's Park, Cicero, Illinois, without payment of the occupational tax of $50.00 as required by 26 U.S.C. 4411 and without registration with the District Director of Internal Revenue as required by 26 U.S.C. 4412; that, thus, the wagering business was being operated and conducted in violation of 26 U.S.C. 4901. The court also found, as a fact, that the respondent monies in the amount of $8,674.00 was being used in this bookmaking business and was an integral part of the business and was intended to be used in violation of the Internal Revenue laws. The court thus concluded that the said respondent monies were forfeit to the United States of America under the provisions of 26 U.S. 7302. (A. 40-41)

On appeal from the judgment of forfeiture, the main basis of attack was the constitutionality of Title 26, U.S.C., §4411 and 4412 on the ground that they were violative of the privilege against self-incrimination. The Court of Appeals, though it expressed its cognition that the constitutional validity question was pending in this Court then on a grant of certiorari, felt itself compelled to dispose of the case with dispatch and bound by *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. (379 F. 2d 948) Petition for Certiorari was taken to this Court, (798, 1967 Term), and the judgment of forfeiture was vacated by this court and the cause was remanded to the Seventh Circuit for reconsideration in the light of the *Marchetti* and *Grosso* decisions, (390 U.S. 204).

On reconsideration, the Seventh Circuit held:

> "The only apparent purpose of 26 U.S.C. §7302, as applied here, is to punish violators of Sections 4411

and 4412 of the Internal Revenue Code by taking away money used in committing the violations. See One 1958 Plymouth Sedan v. Com. of Pennsylvania, 380 U.S. 693, 700, 85 S.Ct. 1246, 14 L.Ed.2d 170. As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture." *United States* v. *U.S. Coin and Currency, etc.*, 7 Cir., 393 F. 2d 499, 500.

It thereupon reversed the judgment of forfeiture and remanded the case for the entry of judgment for this respondent. (Pet. App. D, pgs. 14-15) It is from this judgment that the Petitioner, United States of America, prays the Writ of Certiorari will issue to the United States Court of Appeals for the Seventh Circuit.

THE EVIDENCE

Between the dates, August 1 and 24, 1964, Internal Revenue had a vast surveillance for the purpose of observing wagering activities (other than pari-mutuels) at Sportsmans Park Race Track in Cicero, Illinois, a town bordering on the western outskirts of Chicago. The claimant-petitioner, Donald J. Angelini was one of the persons who came within the orbit of that surveillance. Donald J. Angelini was seen in the course of the surveillance accepting money from some persons and giving money to other persons. Some of the persons to whom he gave money and some of those from whom he accepted money during the month of August were in the wagering business. It is by association of the claimant-respondent with those persons—some of whom had accepted wagers from Internal Revenue Agents—that this money was declared forfeit. (A. 8-28)

Arrest warrants issued for many of the persons under surveillance, claimant-respondent Donald Angelini among them, and they were executed on August 24, 1963.[1] When Mr. Angelini was served with the arrest warrant, he was taken to the United States Courthouse and there directed to empty his pockets. Included in the effects in his pockets were the respondent moneys. (A. 24) Also on his person were documents which an expert government witness testified were recap sheets. (A. 35-39) These recap sheets corresponded in some particulars with betting cards taken from another person arrested, one Joseph Altiere. (A. 34-39) (See *Altiere* v. *United States*, 382 U.S. 367).

[1] This respondent was convicted of wilful failure to register and pay the occupational tax required by Title 26, U.S.C. §4411 and 4412 and was sentenced to 60 days imprisonment and fined $2500.00. On his Petition for Certiorari to this Court he urged the unconstitutionality of those statutes (See *Angelini* v. *United States*, No. 377, October Term, 1965). Certiorari was denied. 382 U.S. 838. Respondent served the sentence, and paid the fine.

ARGUMENT

I.

It is the government's position that the decision below represents an extension of the *Marchetti-Grosso* rationale beyond its express terms and, therefore, this Court should issue its Writ of Certiorari to limit those holdings only to criminal cases. That is not the interpretation put on this Court's decisions by United States Courts. See *United States* v. *Riccio,* N.D.Ill., 282 F. Supp. 979, from which decision the United States has not elected to appeal.

> "*Marchetti* did not turn on the type of proceeding in which the privilege is asserted. The fact that the proceedings at which the privilege is claimed are criminal is not what triggers the validity of the claim of privilege; rather, it is the risk of prosecution for substantive crimes by both federal and state authorities, which makes the information requirement constitutionally infirm when met with the claim of privilege." (282 F. Supp. at 982)

See also *United States* v. *$3296 in Currency,* N.D.N.Y., 286 F. Supp. 543. *United States* v. *One 1967 Buick Electra,* D.C.N.J., 37 L.W. 2172.

The government argues that neither *Boyd* v. *United States,* 116 U.S. 616 nor *One 1958 Plymouth Sedan* v. *Philadelphia, Pennsylvania,* 380 U.S. 693, relied upon by the United States Court of Appeals for the Seventh Circuit requires the result reached by that court in vacating the forfeiture. We disagree. The law established in the great case of *Boyd,* reaffirmed over and again by this court, allows of no other decision. *Boyd* stands for the proposition that forfeiture cannot be based on compelled testi-

mony. This case stands for the proposition that forfeiture will not ensue for a failure to incriminate oneself. This Court held in *Boyd* that a compulsory production of a man's private papers to forfeit his property is within the protective scope of the Fourth Amendment to the Constitution. (116 U.S. at 622) The argument of the United States is that resistance to the unconstitutional compulsion results in forfeiture of property. The argument of the government here is incriminate yourself or forfeit your property. The hazards of compliance with Sections 4411 and 4412 in the State of Illinois were clearly recognized by the United States Court of Appeals for the Seventh Circuit as being the same as those encountered by *Marchetti,* which this court considered real and appreciable (See Appendix A, Petition, page 13).

The alternative presented by the government was, in a different context aptly put by this court in *Boyd.* The registration proceedings present the sad alternative of extortion "from the party his private books and papers to make him liable for a penalty *or* to forfeit his property." (116 U.S. at 624) In this case, the interpretation of "or" is an alternative rather than a conjunction, but the force is the same. "Such a choice was impermissible under the Fourth and Fifth Amendments". (Petitioner's Appendix, page 13) This court did not see any distinction based on the forfeiture nature of the action that the United States attempts to make.

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constition, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are

further of opinion that compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure within the meaning of the Fourth Amendment." *Boyd* v *United States,* 116 U.S. 616, 634-635.

The government argues that *Boyd* and *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, are factually dissimilar in that one involved an *affirmative* violation of a constitutional protection, and the other the use of illegally obtained evidence. In the latter case, the Commonwealth of Pennsylvania equally attempted to distinguish *One 1958 Plymouth Sedan* v. *Pennsylvania,* from *Boyd* (380 U.S. at 698). This court rejected the argument and reaffirmed the constitutional guarantees to be given effect whatever the vehicle (in the case—rather than the locomotive—sense). It rejected an attempt to restrict its own holdings to the confines of the particular case in which it ruled. This is necessary, of course, because this court does not rule ordinarily within the confines of the case tendered to it, but it announces general policies to be applied to all relevant circumstances.

Perhaps because the Sixth Circuit in *United States* v. *One 1965 Buick, etc., et al* (Pet. App. C & D, pp. 16-24) seemed preoccupied with the taxing power of the United States, its urging of Reasons for this Court to grant its Writ begins with the untrammelled and unfettered power to collect taxes civilly.

The United States thus states:

"Accordingly, a person who engages in the business of accepting wagers remains in violation of the wager-

> ing tax laws if he fails to register or pay the prescribed taxes. Although he cannot be punished criminally for such non-compliance, the occupational and excise taxes can still be collected in a civil proceeding." (Page 5, Its Petition)

This point does not arise in this case. This respondent has been assessed the occupational and excise taxes imposed by §4411 and 4412 by the Internal Revenue Service, and has, under protest, paid them as assessed. We are not here concerned with the collections of those taxes. Only forfeiture is involved.

The United States urges that the continuing requirement of the payment of the occupational and excise taxes "Is equally consistent with the rationale of *Marchetti-Grosso* that property used in the violation of Sections 4411 and 4412 is forfeitable under 26 U.S.C. §7302."

Thus, the United States argues that the tax laws should be equated with the forfeiture laws, rather than that the criminal laws governing this subject should be equated with the forfeiture laws. We submit that is absolutely and completely inconsistent with this court's ruling in *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693. In that case it was pointed out that McGonigle, the claimant, would, if prosecuted for the state laws allegedly violated, be subject to a lesser fine than the value of the car for which forfeiture was sought.

This Court found an anomaly in allowing evidence in the forfeiture, but forbidding it in the criminal proceedings. (See 380 U.S. at 701) We submit it is equally anomalous for the United States to suggest this Court hold the provisions of 4411 and 4412 constitutionally unenforceable in the criminal misdemeanor actions, but say at the same time that a heavy civil penalty may ensue by bringing this purportedly civil, but actually quasi-criminal, proceeding.

In arriving at the "equal consistency" argument the United States (p. 5, Its Petition) advances two arguments to this court:

(1) That proof that the property was intended for use in wagering depends on evidence apart from any required declaration in connection with payment of the prescribed taxes, and

(2) That it is immaterial whether the person whose property is seized for such use is the one who must pay the taxes, continuing that the forfeiture proceedings are *in rem* not *in personam*, and are against the defending property, not an individual.

As to (1) above, the United States continues at pages 8 and 9 of its Petition that "Proof of wagering warranting forfeiture is independent of proof of non-payment of the prescribed taxes. While non-payment must be shown, proof that the owner of the property was himself the person liable for the taxes is not necessarily required. In short, the impact of a forfeiture on the privilege against self-incrimination is *at most collateral and indirect.*" (Pp. 8-9, Its Brief)

We agree that the proof of wagering is an element necessary to forfeiture under 7302, but without proof of omitting registration and the paying of the occupational tax under 4411 and 4412 *there can be no forfeiture.* There is no federal law that proscribes gambling in and of itself, divorced from the element of interstate commerce or taxation. The principle interest of the United States under the wagering tax statutes is the collection of revenue, and not the prosecution of gamblers. *United States* v. *Calamaro,* 354 U.S. 351. This argument of the government is not even specious, it does not even have the slightest semblance of vitality.

(2) It would seem that this court's decision in *Boyd* also answers conclusively the argument of the government attempting to distinguish these *in rem* proceedings from the *in personam* criminal proceeding. This court long ago recognized the "relationship of the personal privilege against self-incrimination to proceedings to forfeit property", and found it intimate and not "peripheral". (See United States Petition, page 6)

> "In *U. S.* v. *Mason, Judge* Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' *
>
> * * *
>
> "But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense." *Boyd* v. *United States,* 116 U.S. 616, 637-638.

II.

Under this point, the government urges this court issue its Writ of Certiorari in the captioned cause for the purpose of declaring that the *Marchetti-Grosso* rationale be applied to forfeitures only to cases tried after this court's ruling in those cases. It urges in support of its position that recent cases of this court have limited newly adopted criminal rules, which do not bear on the integrity of the guilt-determining process, to prospective application.

What the United States overlooks in evaluating those cases is that they are exceptions to the rule of complete or limited retroactivity, and prospective application resulted only because of overwhelming contravailing considerations. The first case relied on, *Linkletter* v. *Walker*, 381 U.S. 618, made that eminently clear. It cited Mr. Justice Holmes dissent in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, disclaiming knowledge of any authority for making law only for the future, and emphasizing that judicial decisions have had retrospective application "for near a thousand years." (fn. 6, 381 U.S. at 622). The case emphasized the distinction between new law and true law, and true law is the essence of *Marchetti-Grosso*. It is old law that a man may not be compelled to incriminate himself; it is old law that he cannot be punished for refusing self-incrimination. But it also recognized that when a case wrongly decided (here *Kahriger-Lewis*) is overruled, intermediate cases "finally decided" are not to be disturbed. But this case is not finally decided. The moneys here have not been definitively condemned (381 U.S. at 625-626), and should be restored.

After a complete review of the history regarding the question, this Court concluded:

"Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy, supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations * * * and particular conduct * * * of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' Chicot County Drainage Dist. v. Baxter State Bank, supra, 308 U.S., at 374, 60 S.Ct. at 319." *Linkletter* v. *Walker*, 381 U.S. 618, 627.

It would seem that (1) above would conclude the Government's argument as to this case.

Recently the United States Court of Appeals for the Second Circuit, sitting en banc, recognized retroactivity as the basic rule, when faced with the recently recurring urgings of the United States for prospective application only, but it continued in analysis of the cases urged there as they are here, as standing to justify prospective application:

"In *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n. 3 (1966), the Court similarly treated the rule announced in *Griffin* v. *California*, 380 U.S. 609 (1965), which forbade adverse comment by prosecutors and judges on the failure of a defendant to testify in a state criminal trial. However, relying on the later-decided opinions in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Government counters that the Supreme Court did not realize what it was doing in the earlier decisions discussed above. The Government claims that 'if the Court had ever considered the question squarely' in those earlier decisions, it would have ruled the other

way. However, a careful consideration of even the cases relied on by the Government and of the underlying considerations leads us to reaffirm *Sheller*.

In *Stovall* v. *Denno, supra*, the Supreme Court considered the retroactivity of the rules announced in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), which required 'the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel.' 388 U.S. at 294. The Court pointed out, *id.* at 296-97, that the *Linkletter*, *Tehan*, and *Johnson* cases

> 'establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ." [Citation omitted.] The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'

"Applying these criteria in *Stovall*, the Court held that the new rules were prospective only and refused to distinguish between 'convictions now final . . . and convictions at various stages of trial and direct review.' It regarded 'the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable.' *Id.* at 300-01. The analysis in *Johnson* v. *New Jersey*, 384 U.S. 719, 726-33 (1966), also relied on by the Government, was similar." *United States* v. *John D. Tarrago*, 2 Cir., Docket No. 30416, Sept. Term, 1967.

On the other hand, applying this reasoning to the question in this case, leads to a completely opposite result.

Extending the *Marchetti-Grosso* rule to forfeiture cases still on appeal when it was announced will place no significant "burden on the administration of justice." In *Stovall* and *Johnson*, the court was obviously concerned that great numbers of cases might be reopened even by limited retroactivity. The United States has not demonstrated any interest in how many cases that might be, and does not inform this court of any such considerations that might color its determination of the degree of retroactive application of *Marchetti-Grosso*. However, inquiry by your respondent has come to a conclusion that only one case in this (the 7th) circuit awaits the outcome of this determination, that is *United States* v. *One 1967 Cadillac*, an appeal from the Eastern District of Illinois, and docketed in the United States Court of Appeals for the Seventh Circuit under its number 16732. The United States Court of Appeals for the Seventh Circuit can hardly be considered a minor circuit, either geographic- or population-wise, and if, as is altogether possible this is a reflection of the cases to be effected by limited retroactivity, the burden on law administration is minimal to the near extent of nonexistence. Moreover, as the Second Circuit said, no further hearings will have to be held on "the excludability of evidence long since destroyed, misplaced or deteriorated, compare *Linkletter* v. *Walker*, 381 U.S. at 637. There is no problem here of "a legalized mass of jail break by rapists, murderers, and other felons." See *Schwartz*, retroactivity reliability and due process: a reply to Professor Mishkin, 33 U.Chi. L.Rev. 719, note 4, page 745.

Similarly, no overpowering argument of reliance by "law enforcement authorities" can be made. The respondent monies seized here, were seized as an incident to Mr. Angelini's arrest, for violation of Section 7203 in that he

did wilfully fail to comply with Sections 4411 and 4412 of Title 26. Nothing was done in reliance upon former decisions on the search incident to arrest, searches incident to arrest are not affected by this decision. No law affecting the right to search incident to arrest has been changed.

Further the government says at page 7 of its Petition:

> "Not only is the question presented an important one, but the present confusion for enforcement officials and those subjected to forfeitures is of sufficient magnitude to warrant resolution."

What present confusion? What warrant will issue, either arrest or search, under the authority of 7203 for failure to comply with 4411 and 4412 of Title 26?

In *Boyd* v. *United States*, 116 U.S. 616, this court spoke of reliance by law enforcement authorities on the old standards, and in speaking said:

> "No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *Consuetudo est optimus interpres legum:* and another maxim that *Contemporanea expositio est optima et fortissima in lege.* But we do not find any long usage or any contemporary construction of the Constitution which would justify any of the Acts of Congress now under consideration." *Boyd* v. *United States*, 116 U.S. 616, 622.

There is no reliance by law enforcement authorities on any standards that allow 26 U.S.C. 7302 to be employed to authorize forfeiture for violation of laws, which laws themselves are determined to be constitutionally unenforceable. Future and present arrests, for such alleged violations as 4411 and 4412, are under *Marchetti* and

Grosso out of the question, and if they have been performed, those cases have long since been dismissed.

If the government agents "obviously relied upon the prior holdings of this court specifically opposing the validity of the wagering tax statutes. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419," why is the argument about retroactivity not equally applied to criminal cases? Why would not the rule of *Marchetti* and *Grosso* be as measurably furthered by prospective application of those decisions to criminal cases? The government does not answer that question, they merely say that they have not "urged the non-retroactivity of *Marchetti-Grosso* with respect to criminal prosecutions." (page 9, Their Petition) They did elucidate a different result was justified in forfeiture proceedings. Are they saying that an $8,500.00 fine for a criminal violation would not have been a tremendous impact?

All of the cases relied on by the United States stood for the proposition that the defendants convicted could, and probably would, have anyway have been convicted under the present-existing rules of evidence. The theory has no application to this case. It was here necessary to prove that the government show that this claimant-respondent had not filed the Form 11, created pursuant to Section 4412 of Title 26, U.S.C. The *Marchetti-Grosso* cases determined that since the filing of Form 11-C had built-in incrimination under state laws, the requirement of filing, without constitutionally enacted safeguards against self-incrimination, was violative of the Fourth and Fifth Amendments of the Constitution of the United States.

The "guilt determining process" has no integrity apart from the self-incriminatory requirement imposed by 4411 and 4412 so as to make 7203 operative. We invite the

government to show how a "wilful" failure to comply with the provisions of 4411 and 4412 can be made to determine guilt without a showing that compliance with those sections would have breached the privilege against self-incrimination while the law stands in its present form. The United States has not elected to make any argument to demonstrate that constitutionally secured convictions and forfeitures could have ensued without proof that a claimant was obliged to comply with the law enacted under 4411 and 4412 except by waiving his constitutional rights.

On the original Brief in opposition for the Writ of Certiorari, No. 798, October Term, 1967, the Solicitor General argued as follows:

> "We agree with petitioner that the resolution of the self-incrimination issue in the pending cases may have a bearing upon the validity of the forfeiture in this case. The basis of the libel is that the money was 'property intended for use in violating the provisions of the internal revenue laws.' This Court's determination as to whether the underlying tax statutes are or are not valid can thus affect the right to forfeit property intended for use in violation of such laws.
>
> "Accordingly, it would seem appropriate to defer action on the present petition until the *Marchetti* and *Grosso* cases are decided."

Later in that case the government filed what it called its Supplemental Memoranda for the United States in Opposition to the Petition for the Writ of Certiorari, and there urged upon this court the same arguments presented here in support of strict prospective application (as opposed to restricted retroactive application). There, as here, no facts were recited to deviate from the basic rule that has been enunciated hereinbefore. This court did not comment on that supplemental memorandum. In this Peti-

tion for the Writ, the United States twice adverts to the failure of the United States Court of Appeals for the Seventh Circuit to discuss the matter of retroactive application and applied by *Marchetti-Grosso* decisions to forfeitures (See Its Petition, pages 4 and 7). Neither on remand of cause number 798, October Term, 1967, was any urging for such consideration made, nor after that court's decision (Petitioner's Petition, Appendix A) was the Seventh Circuit even requested to consider retroactive, limited prospective, or unlimited prospective application, in forfeiture cases. Why, then, should there be any discussion! The United States argues that it has not urged strict prospective application in criminal cases, and, in fact, without more ado has forthwith dismissed its criminal prosecutions even on appeal, of cases brought pursuant to Section 7203 for failure to comply with Sections 4411 and 4412 of Title 26, U.S.C. It has not favored us with any more than conclusions on why one should be applied prospectively, and the other retrospectively. If the United States in a criminal prosecution obtained a fine of $8,500.00, it would indeed have had a big win, and fines are equated with forfeitures.

III.

The main opinion in *United States* v. *One Buick, etc.*, Defendants (See Pet. App. C), 392 F. 2d 672, goes mostly on the right of imposing civil liabilities for non-payment of taxes. THAT IS NOT INVOLVED HERE, as noted hereinbefore. The assessed occupational and excise taxes under Title 26, U.S.C. §4401 and 4411 have been paid. However, that case, on Petition for Rehearing (See Petitioner's Appendix D) indicates that "the court further found that the funds in the 'bank' did not belong to the Deans [the Claimants], but were merely gambling money in their custody" (Page 23), and later that "We do not

believe that the District Court should be required to determine the beneficial owners of the 'bank' which wagers constituted the fund . . . " Thus a powerful distinction exists between that case and this, and no real conflict is presented. Under the fact finding (first quotation) the Deans were not proper Claimants. Under the second quotation the Deans apparently concurred that there were other "beneficial owners of the bank" (and thus that others have a rightful claim to the fund), but who had not filed any claim or answer protesting the forfeiture.

However, the Court should consider that a rift in Circuits has been recognized by the United States District Court for the Northern District of New York on two occasions (See *United States* v. *$3,296 in Currency*, 286 F. Supp. 543, referring to and expressing agreement with *United States* v. *$125,882 in U. S. Currency*, ... F. Supp. ....., 68-1 U.S.T.C., p. 15,846 (S.D.N.Y. May 4, 1968) and by the District Court of New Jersey in *United States* v. *One Buick Electra*, D.C.N.J., 37 L.W. 2172. All followed the law as expressed in this case by the Seventh Circuit, expressly rejecting the Sixth Circuit decision, 392 F. 2d 672.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied, or in the alternative, that the Writ be granted, and the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Claimant-Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI, CLAIMANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 16–18) is reported at 393 F. 2d 499.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1968. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 6, 1968, and on September 4, 1968, the petition was filed. Certiorari was granted on November 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, prohibiting the criminal prosecution of individuals who properly assert the privilege against self-incrimination as a ground for non-compliance with the federal wagering tax laws, preclude the forfeiture, under 26 U.S.C. 7302, of property used in violation of these laws.

2. Whether, if the rationale of those decisions is applicable to forfeiture proceedings, it should be applied retroactively to cases in which seizures of the forfeitable property occurred prior to the date those decisions were rendered.

STATUTE INVOLVED

26 U.S.C. 7302 provides:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale

of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

STATEMENT

On February 18, 1964, a libel was filed in the United States District Court for the Northern District of Illinois seeking the forfeiture of $8,674 to the United States under 26 U.S.C. 7302. A claim to the respondent money was filed by claimant Angelini. The libel alleged, *inter alia,* that a gambling business had been conducted by claimant Angelini without his having registered or paid the special occupational tax as required under 26 U.S.C. 4411 and 4412, in violation of 26 U.S.C. 4901; that the $8,674 at issue had been used or intended for use in that illegal business; and that respondent money had thus been lawfully seized by the government (A. 5–6).

Claimant Angelini denied the illegal operation of a gambling business, and denied that the money seized had been used or intended for use in that business (A. 7–8). The bulk of the testimony at trial showed that Angelini and one Joseph Altiere conducted a bookmaking operation at Sportsman's Park, a Cicero, Illinois, racetrack, during the month of August 1963, and that the $8,674 involved was being used in that business, as "ready cash" to pay off betting customers (Tr. 11–187). Also entered into evidence was a stipulation to the effect that Angelini had not registered as a person engaged in the business of wagering as required by 26 U.S.C. 4412, or paid the special oc-

cupational tax as required by 26 U.S.C. 4411 (Tr. 8-10), and that he had been convicted in 1964 for those criminal violations.[1] At the conclusion of the trial, the district court found that a gambling business had been conducted by claimant Angelini in violation of 26 U.S.C. 4411 and 4412, and that the money, which he had been carrying on his person at the time of his arrest, had been used in that illegal business (A. 9–10). Accordingly, forfeiture of respondent $8,674 was awarded to the United States (A. 11).

Although not raised at trial, claimant contended in the court of appeals that the forfeiture of property used in violation of 26 U.S.C. 4411 and 4412 violated his privilege against self-incrimination. The court of appeals withheld opinion pending disposition of *Marchetti* and *Grosso* by this Court at the 1966 Term. When reargument was ordered in those cases on June 12, 1967 (388 U.S. 903, 904), however, the court of appeals proceeded to affirm the judgment of forfeiture on the authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419 (A. 12-15; 379 F. 2d 946). A petition for certoriari was filed by claimant Angelini, and following this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, on January 29, 1968, the

[1] See *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838, an appeal from Angelini's criminal conviction for violations of 26 U.S.C. 4411 and 4412. On appeal in that proceeding, Angelini challenged the sufficiency of the evidence to show that the money had been used in a gambling business. That contention, however, was abandoned in his petition for a writ of certiorari in this Court filed before the *Marchetti-Grosso* opinions.

case was remanded for reconsideration in light thereof (390 U.S. 204). Thereafter, the court below held that claimant Angelini's privilege against self-incrimination constituted a defense against a forfeiture proceeding brought against the respondent property (A. 16–18; 393 F. 2d 499). Accordingly, it reversed the district court's judgment of forfeiture and remanded for the entry of an appropriate judgment in claimant's favor (A. 19). The government sought certiorari, noting the direct conflict between that holding and the decision of the Sixth Circuit in *United States* v. *One 1965 Buick,* 392 F. 2d 672 (C.A. 6), pending on petition for a writ of certiorari, No. 619, this Term, where the court held *Marchetti-Grosso* inapplicable to forfeiture proceedings.

SUMMARY OF ARGUMENT

I

In *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, this Court held that the Fifth Amendment privilege against self-incrimination affords a complete defense against criminal convictions based upon failures to register or pay the occupational and excise taxes as required by 26 U.S.C. 4401, 4411, and 4412. Nothing in those decisions, or the underlying rationale of the privilege against self-incrimination, however, precludes a forfeiture of property used in violation of the wagering tax laws.

Traditionally, statutory forfeitures have been viewed as proceedings *in rem* against property used in violation of the law. Unlike the common-law doctrine of

forfeiture—which attached as part and parcel of the criminal conviction—statutory forfeitures are not dependent upon a criminal conviction of the offender, nor must the owner of the particular goods seized share any criminal responsibility. It was in accord with this concept that the statute here in issue (26 U.S.C. 7302) was enacted. In contrast to those statutes providing for criminal sanctions, Congress enacted Section 7302—which is not limited to wagering tax violations—with the clear purpose of removing the offending property from circulation, and not punishing an individual offender. To this end, Congress has designated that statutory forfeiture proceedings are directed against property, not persons, and that the property so forfeited should be treated as collections of internal revenue.

In this setting, therefore, it is clear that neither the *Marchetti-Grosso* rationale, nor the underlying spirit of the privilege against self-incrimination, prohibits a forfeiture of property used in violation of the wagering tax laws. Those laws remain valid as taxing provisions, notwithstanding *Marchetti-Grosso,* and the prescribed taxes are collectible civilly. Engagement in the gambling business without payment of the prescribed taxes is thus illegal, and property so used in an illegal business is subject to forfeiture under 26 U.S.C. 7302, the basic purpose of which is to remove such offending property from circulation.

Even if forfeiture of property could be deemed a "penalty" arising out of the invocation of the privilege against self-incrimination, it is a penalty which attaches to the property, and not to the person who

seeks to invoke the privilege. Since property—unlike a natural person—does not enjoy any privilege against self-incrimination under the Fifth Amendment, no bar to a forfeiture for violations of the wagering tax laws is thereby provided.

Apart for the *Marchetti-Grosso* decisions, forfeiture proceedings do not result in the imposition of a "penalty" impermissible under the privilege as a general matter. Recent decisions of this Court establish no blanket rule in this regard. Here the "penal" aspect, if any, is an attenuated one. Moreover, if forfeitures under 26 U.S.C. 7302 in the wagering tax context are viewed as imposing a penalty, the same conclusion would presumably be reached as to all forfeitures under that statute. Such a result would render the statute nugatory, and is not required by the Fifth Amendment, in the wagering tax context or otherwise.

II

If this Court should hold the *Marchetti-Grosso* rationale applicable to forfeiture proceedings brought under Section 7302, it should nonetheless not be applied to cases in which seizures were made prior to January 29, 1968—the date of those decisions. Although we have not urged a rule of non-retroactivity as to criminal convictions imposed for violations of the wagering tax laws, forfeiture proceedings entail different considerations which militate against a rule of retroactive application.

When considered in the context of a forfeiture proceeding—where the privilege is, at most, peripherally involved—the purpose of the new rule must, we be-

lieve, yield to other considerations. Governmental reliance upon the prior doctrine, as set forth in *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419, is plain, and the burden that a retrospective application of the new rule would have upon the due administration of justice is demonstrable.

In reliance upon *Kahriger* and *Lewis,* approximately $6.5 million of property used in violation of the wagering tax laws has been seized for forfeiture to the government. In all likelihood, not even a major part of that property would be subject to return if *Marchetti-Grosso* were retroactively applied to forfeitures. Nonetheless, the potentialities of litigation relating to this matter are so great that this Court should make clear that the rationale of those decisions does not serve to divest the government of title to property validly acquired through forfeitures prior to the date of the decisions.

ARGUMENT

I. THE RULING OF THIS COURT IN THE *MARCHETTI-GROSSO* DECISIONS THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS A DEFENSE TO A CRIMINAL PROSECUTION FOR NON-PAYMENT OF WAGERING TAXES DOES NOT CONTROL FORFEITURE PROCEEDINGS WHICH ARE DESIGNED TO REMOVE OFFENDING PROPERTY FROM CIRCULATION

In *Marchetti* v. *United States,* 390, U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, this Court held that the Fifth Amendment privilege against self-incrimination affords a proper defense to criminal punishment for failing to pay the special occupational tax on wagering imposed by 26 U.S.C. 4411, or the

ten-percent excise tax on wagers imposed by 26 U.S.C. 4401. In so holding, however, the Court did not rule that the wagering tax laws as such were unconstitutional. The Court emphasized in *Marchetti*:

> The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases. [390 U.S. at 44.]
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> * * * * *
>
> * * * We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful. [390 U.S. at 58.]
>
> * * * * *
>
> * * * [N]othing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes. [390 U.S. at 60.]

From this language it is clear that *Marchetti* and *Grosso* hold neither that the wagering taxes as such are constitutionally impermissible,[2] nor that the operation of a gambling business without payment of the required taxes is lawful as a matter of federal law. Rather, the limited holding of those cases was clearly and precisely articulated in the Court's opinions. In *Marchetti*, it was stated:

> * * * For reasons which follow we have concluded that these provisions [26 U.S.C. 4411, 4412] may not be employed to *punish criminally*

[2] See also *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), holding that *Marchetti* and *Grosso* do not preclude collection of the ten-percent excise tax in a civil suit.

> those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination. [390 U.S. at 41–42; emphasis added.]
>
> * * * * * * * * [W]e hold only that those who properly assert the constitutional privilege as to these provisions may not be *criminally punished* for failure to comply with their requirements. [390 U.S. at 61; emphasis added.]

And in *Grosso,* the Court explicitly noted (390 U.S. at 69–70, n. 7):

> We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax. [Emphasis added.]

In light of this clear and explicit holding, it is our position that the rationale of *Marchetti-Grosso* precludes, upon proper invocation of the privilege, criminal punishment for violation of the wagering tax laws—but nothing more. Those decisions in no respect extinguish civil liability for the prescribed taxes, and should not be extended so as to prevent the forfeiture of property used in a wagering business conducted in violation of law. The court below erred in so enlarging the reach of those holdings, and its erroneous decision—in conflict with that of the Sixth Circuit (see *supra,* p. 5)—should be reversed.

A. FORFEITURE ACTIONS ARE *IN REM* PROCEEDINGS WHICH ARE REMEDIAL IN NATURE, AND DO NOT SEEK TO PUNISH AN INDIVIDUAL

At the outset, it is appropriate to focus on the wording of the Self-Incrimination Clause of the Fifth Amendment: "No person * * * shall be compelled in any criminal case to be a witness against himself." That this provision should be applicable in the present circumstances is far from obvious. Unlike the common-law doctrine of forfeiture, under which a convicted felon forfeited his goods and chattels to the crown as part and parcel of the criminal conviction, statutory forfeitures—with long antecedents in our jurisprudence—have always been viewed as *in rem* proceedings brought against the property itself. *Goldsmith-Grant Co.* v. *United States,* 254 U.S. 505, 510–511. See also *The Palmyra,* 12 Wheat. 1, 14; *Dobbins's Distillery* v. *United States,* 96 U.S. 395, 399–401; *United States* v. *Stowell,* 133 U.S. 1; *Various Items* v. *United States,* 282 U.S. 577, 580–581. Indeed, the nature of statutory forfeiture proceedings, such as those brought under 26 U.S.C. 7302, is evidenced by the fact that the property itself is the respondent, and that a libel is filed by the government against that property which must show only that the property was used in violation of federal law (see A. 5–6). For these reasons, it has long been established that the success of forfeiture proceedings is not dependent upon the criminal conviction of the user or possessor of the property at the time of its seizure, or upon the criminality *vel non* of its owner. As was stated by Mr. Justice Story in *The Palmyra,* 12 Wheat. 1, 14–15:

* * * It is well known, that at common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or, at least, a consequence, of the judgment of conviction. It is plain, from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right, by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem,* cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum,* or *malum in se.* The same principle applies to proceedings *in rem* on seizures in the admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem,* and there is no accompanying penalty *in personam*; many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases, has it ever been decided, that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly un-

affected by, any criminal proceeding *in personam*.

See also *Various Items* v. *United States, supra,* and *Helvering* v. *Mitchell,* 303 U.S. 391; but compare *Coffey* v. *United States,* 116 U.S. 436. This Court has on several occasions held that the lack of criminality of the owner-claimant of the property involved is wholly irrelevant in forfeiture proceedings. *Goldsmith-Grant Co.* v. *United States,* 254 U.S. 505; *Van Oster* v. *Kansas,* 272 U.S. 465.[3]

The theory underlying statutory forfeitures is that, when property used in violation of law is removed from circulation, the statutory purpose of the underlying legislation will be fostered, and at least to some extent served, whether or not the individual offender is caught and brought to justice. Indeed, in a forfeiture proceeding it is the property itself that, in a real sense, is the offender, and thus the defendant. For example, Section 25 of Title II of the National Prohibition Act of October 28, 1919 (41 Stat. 315), from which the present general forfeiture statute in the tax area—26 U.S.C. 7302—is derived, was clearly designed to remove liquor, and property used in its manufacture, from circulation, without regard to criminal conviction of the offender.[4] Had it proved

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[3] For a general discussion of the subject, see Note, *Forfeiture of Property Used in Illegal Acts*, 38 Notre Dame Lawyer, 727 (1963).

[4] Compare Section 26 of the same statute (41 Stat. 315–316), which specifically provided that forfeiture of *vehicles* used in violation of the law could be effected only after *conviction* of the offender.

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possible to seize and destroy all intoxicating liquor and property used in the illegal manufacture of liquor, the prohibition laws would have been effective even if no offender ever went to jail. Admittedly, the use of forfeiture as a means of enforcing a tax is somewhat more indirect, for the essential aim of taxation is the raising of revenue. Nonetheless, a business subject to valid taxes is operating illegally if those taxes are not paid. And if the property used in such a business is removed from circulation when the taxes are not paid, such an illegal business will not be able to function, at least very effectively, whether or not its operator is convicted of a crime.

For this reason, forfeiture has been decreed by Congress as a means of enforcing many taxes which have none of the deterrent purposes of taxes relating to matters such as gambling or narcotics. Indeed, forfeitures under the statute here involved—26 U.S.C. 7302—are in no respect limited to those resulting from violations of the wagering tax laws. Property used in violation of laws relating to tobacco taxes (26 U.S.C. 5763), in violation of laws relating to taxes on firearms (26 U.S.C. 5862(a)); in violation of the Gun Control Act of 1968 (Ch. 44, Sec. 924 of Title 18; 82 Stat. 1213, 1223–1224); in violation of laws relating to the transportation in interstate commerce of contraband articles (49 U.S.C. 781); and in violation of certain laws relating to the taxation of distilled spirits, is also subject to forfeiture under that section. Congress has, to be sure, undertaken to alleviate to some extent the particular hardship to innocent individuals which may result from forfeitures by providing for remission and

mitigation.[5] But the decision to grant such relief reinforces rather than negates the notion that statutory forfeitures are designed essentially to remove the offending property from circulation, without regard to whether or not the violator of the particular law is himself criminally convicted.

The difference between forfeiture proceedings and criminal prosecutions has been recognized in regard to procedure as well as substance. Thus, in a forfeiture proceeding, the trial court may, upon a proper evidentiary showing, direct a verdict in favor of the government. *Four Packages* v. *United States,* 97 U.S. 404, 412. Unlike the principles governing a criminal case, the government's burden of proof is less than that of guilt beyond a reasonable doubt, and the burden may even shift to the claimant. *Lilienthal's Tobacco* v. *United States,* 97 U.S. 237, 265–267. In a forfeiture proceeding, a claimant does not enjoy the Sixth Amendment right to confrontation, *United States* v. *Zucker,* 161 U.S. 475, and the government may appeal from an adverse decision (*ibid,* by implication). A criminal conviction or acquittal of a defendant for the acts giving rise to the forfeiture proceeding does not bar the *in rem* action against the property. *Various Items* v. *United States,* 282 U.S. 577. In sum, the type of forfeiture proceeding here involved has never been deemed the equivalent of a criminal action.

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[5] The remission and mitigation procedures applicable to seizures under the customs laws (19 U.S.C. 1618) are also applicable to forfeiture proceedings under 26 U.S.C. 7302. See 26 U.S.C. 7327.

Specifically, this has been the consistent approach with respect to 26 U.S.C. 7302, the statute here at issue. The statute presently provides, in pertinent part:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property.

No mention is made in that statute that forfeiture is in any respect dependent or contingent upon the criminal conviction of anyone. Indeed, the carrying on of a business without payment of the prescribed taxes is made a crime elsewhere in the provisions of the Internal Revenue Code, and separate and distinct criminal sanctions are imposed thereunder (26 U.S.C. 7203, 7272). Cf. *Helvering* v. *Mitchell,* 303 U.S. 391, 404–405. The statute does not distinguish between forfeitures of property from violators of the underlying law and forfeitures from those who share no criminal responsibility. See, *e.g., United States* v. *Bride,* 308 F. 2d 470 (C.A. 9); *United States* v. *One 1958 Pontiac Coupe,* 298 F. 2d 421 (C.A. 7). Moreover, Congress has specifically provided that forfeiture proceedings brought under Section 7302 shall be in the nature of *in rem* proceedings (26 U.S.C. 7323; see also 28 U.S.C. 2461), and that the proceeds of such proceedings should be paid to the Secretary of the Treasury "as collections of internal revenue taxes" (26 U.S.C. 7406). In light of all these considerations, this Court has properly noted that forfeiture proceedings brought under 26 U.S.C.

7302 are "preventative and remedial" in nature. *United States* v. *Dixon,* 347 U.S. 381, 382, n. 1; see also *Kent* v. *United States,* 157 F. 2d 1 (C.A. 5); *United States* v *Windle,* 158 F. 2d 196 (C.A. 8). They seek not to punish any individual for violating a certain law, but rather to correct that violation, to the extent possible, by removing the property used in connection therewith from circulation.

B. PROPERTY SUBJECT TO FORFEITURE ENJOYS NO PRIVILEGE AGAINST SELF-INCRIMINATION WHICH CAN BE ASSERTED TO PREVENT FORFEITURE

Once the essential nature of statutory forfeiture is recognized—that it is a means of keeping property used in an illegal business out of circulation, without regard to the personal criminality of the owner—then it becomes clear that neither the actual holdings of the *Marchetti-Grosso* decisions nor their underlying rationale, as regards the privilege against self-incrimination, proscribes forfeitures of property used in violation of the wagering tax laws.

The *Marchetti-Grosso* decisions rest on the premise that a person may not be criminally convicted for failing to take certain actions, *i.e.,* registration and payment of prescribed taxes, when to do so would result in subjecting himself to substantial hazards of incrimination. But no individual is sent to prison when a forfeiture occurs, no criminal conviction results. In fact, the government may be awarded a judgment of forfeiture even though no person is criminally convicted for the offense giving rise to the forfeiture, and even though the owner-claimant of the forfeited property has no criminal responsibility. One whose

property is forfeited has no criminal "record" which can later be used against him. Forfeitures of property authorized under Section 7302 are thus not criminal sanctions within the meaning of *Marchetti-Grosso*. Contrary to the holding below, therefore, forfeiture proceedings are not barred by those decisions. Neither *Boyd* v. *United States*, 116 U.S. 616, nor *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, relied upon by the court below (A. 17–18), requires a different result.[6]

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[6] In *Boyd*, a subpoena was served upon the claimant to produce certain records and invoices which were clearly incriminating in themselves. In holding that the subpoena was improperly issued under those circumstances, the Court simply stated the now well-established doctrine that the right to refuse to divulge incriminating facts is not limited by the nature of the proceeding, but may be asserted before a grand jury investigation (*Counselman* v. *Hitchcock*, 142 U.S. 547; *Brown* v. *Walker*, 161 U.S. 591; *Hale* v. *Henkel*, 201 U.S. 43); in civil proceedings (*McCarthy* v. *Arndstein*, 266 U.S. 34); in investigations before a legislature or legislative body (*Quinn* v. *United States*, 349 U.S. 155; *Emspack* v. *United States*, 349 U.S. 190); in investigations before administrative agencies (*Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447); or indeed, in police stations (*Miranda* v. *Arizona*, 384 U.S. 436). Moreover, in *Boyd* the Court construed the forfeiture statute under which the government was proceeding not as providing for an action basically remedial in nature, but as involving a forfeiture similar to that provided for under the common-law concept of forfeiture—that is, a proceeding under which "* * * the forfeiture of the goods could have been included in the judgment [of conviction]" (*Boyd*, 116 U.S. at 634). In addition, *Boyd* had Fourth Amendment implications which are not present here.

It is clear that the *Boyd* principle does not apply to forfeiture proceedings which are remedial in nature. *Helvering* v. *Mitchell*, 303 U.S. 391, 404, n. 12; see also *Kent* v. *United*

More basically, the rationale underlying Section 7302 indicates that forfeitures thereunder, in fact as well as in form, are directed against property, and are designed to remove the property from circulation so that an illegal business cannot function effectively. Items of property have no privilege against self-incrimination, for the privilege, literally and historically, is uniquely personal in nature. So long as the tax is valid—and this Court made clear in the *Marchetti-Grosso* decisions that the wagering tax laws are—the property used in a gambling business on which the prescribed taxes have not been paid is being used in violation of the law. In many instances of forfeiture, the person responsible for the non-payment of such taxes may not be the owner of the property at all. Thus, if a gambler, using borrowed equipment,

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States, 157 F. 2d 1, 2 (C.A. 5); *United States* v. *Harvin*, 91 F. Supp. 249, 250 (E.D. Va.). It likewise seems clear that it was the former type of forfeiture to which the Court was referring in *Plymouth* when it stated that "a forfeiture proceeding is quasi-criminal in character [since] [i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700). As the foregoing discussion shows (*supra*, pp. 11–17), that cannot fairly be said about forfeiture proceedings under 26 U.S.C. 7302.

Moreover, in the *Plymouth* case, the question was whether evidence illegally seized by State officials could be introduced into evidence in a forfeiture proceeding brought by the State of Pennsylvania. In holding that such evidence was inadmissible under *Mapp* v. *Ohio*, 367 U.S. 643, the Court based its decision in part on the construction given to the forfeiture statute by the Pennsylvania Superior Court as a "penalty" (*Plymouth*, 380 U.S. at 701–702). And see Rule 41, F.R. Crim. P., wherein it is stated that illegally obtained evidence "shall not be admissible in evidence at *any* hearing or trial" (emphasis added).

fails to register and pay the taxes under the provisions of 26 U.S.C. 4401, 4411 and 4412, and the property is thereafter forfeited, the innocent owner, and not the gambler, suffers a loss unconnected with the privilege. Although it may be argued that the loss was occasioned by the assertion of the privilege by the gambler, the innocent owner cannot derive any benefit therefrom, because the privilege is personal and may be exercised only by the person in whom it adheres. It is the *fact* of use in an illegal business, and not the reason for the illegality, which determines the liability of property for forfeiture. Even if the reason for the illegality of such use is that the owner of the property failed to pay taxes because of fear of self-incrimination, the fact remains that the property is being utilized illegally. As such, then, it is subject to forfeiture.

This analysis, we suggest, makes the present case indistinguishable in principle from the situation involved in *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286. In that case a New York statute provided that all contracts awarded by a public authority must include a clause providing for cancellation of the contract upon the invocation of the privilege against self-incrimination by any corporate officer before a grand jury. During 1964, appellant—a closely held family corporation—was party to three painting contracts containing the standard disqualification clause. In 1965, the president of the corporation—who owned approximately ten percent of its stock—refused to testify before a grand jury investigating alleged bid rigging on public contracts. As a consequence, the con-

tracts of the corporation were cancelled. In rejecting an argument that the cancellation of the contract constituted an unconstitutional penalty imposed upon the invocation of the privilege, the Court pointed out that the privilege was applicable only to natural persons, and not to corporations. Thus, the Court ruled, appellant corporation could not "take advantage of the claimed invalidity of a penalty imposed for refusal of an individual, its president, to wave the privilege" (392 U.S. at 289). Here, similarly, the respondent property itself does not enjoy any privilege against self-incrimination, and cannot take advantage of the claimed invalidity of any penalty allegedly imposed upon a gambler who failed to register and pay the appropriate taxes to avoid potential self-incrimination. To like effect, it has been held that the privilege has not been violated where, in order to obtain a benefit a person must disclose facts which, in exercise of the privilege he could not in another context have been compelled to disclose. *E.g., Kimm* v. *Rosenberg,* 363 U.S. 405 (relief from deportation); *Kaufman* v. *Hurwitz,* 176 F. 2d 210 (C.A. 4) (discharge in bankruptcy). So, here, the fact that a person may not, because of the privilege, be criminally prosecuted for failure to pay a valid tax, does not give him the affirmative right to avoid the force of the general provision that any property used in a business operated in violation of law is subject to removal from circulation by forfeiture.

There is, to be sure, some force to the observation of the court below that the claimant "would have subjected himself to exactly the same hazards" as Mar-

chetti and Grosso by complying, although it recognized that "the consequences of noncompliance are not the same in the two cases" (A. 17). The court suggested that "the prospect of losing in excess of $8,000 has a substantial coercive effect," while acknowledging that "[t]he prospect of a felony conviction involved in *Marchetti*" was significantly more coercive (*ibid.*). From these premises, it concluded that since *Marchetti* "means that * * * violation [of the wagering tax laws] are no longer punishable directly," then "[i]t follows that they should not be punished indirectly through forfeiture" (A. 18). In our view, however, this reasoning is too facile.

In the first place, the court below simply assumed that the property involved in a forfeiture proceeding rightfully belongs to the individual required to comply with the wagering tax laws. That is demonstrably not the case, once the nature of statutory forfeiture is understood. Moreover, the court was mistaken in suggesting that "[t]he only apparent purpose of 26 U.S.C. § 7302, as applied here, is to punish violators of Sections 4411 and 4412 * * * by taking away money used in committing the violations" (A. 18). We submit that the Sixth Circuit correctly analyzed the problem in *United States* v. *One 1965 Buick,* 392 F. 2d 672 (C.A. 6), reaching the opposite conclusion from that of the Seventh Circuit in the instant case regarding the applicability of the *Marchetti-Grosso* rationale to forfeiture proceedings. There the Sixth Circuit noted that "[t]he primary purpose" of 26 U.S.C. 7302 is to assist in "the effective enforcement of the revenue laws" (392 F. 2d at 675). Continuing, that court

stated, "A reading of the language of the statute, in the light of the purpose for its existence, leads to the conclusion that it outlaws any property used or intended for use in violating the Internal Revenue laws and sanctions forfeiture thereof" (*ibid.*).[7]

In sum, 26 U.S.C. 7302 authorizes *in rem* proceedings directed against property used or intended for use in violating the internal revenue laws. The wagering tax laws remain valid taxing provisions, despite *Marchetti-Grosso*. While individuals cannot be punished criminally for their violation if the privilege is properly asserted in defense of non-compliance, the taxes due can still be collected civilly. Not only is this a fair reading of the language in the opinions in *Marchetti* and *Grosso* (see *supra*, pp. 8–10), but the Fourth Circuit recently has squarely so held. *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4). In concluding that "the civil liability here involved remains entirely valid," that court relied extensively on this Court's efforts in the *Marchetti-Grosso* opinions to make clear that it was not holding the underlying taxes void. It seems but a short step to conclude that, if the wagering taxes can be collected civilly, the taxing provisions can be enforced—like other valid tax laws—through forfeiture proceedings. As has been pointed out, in a pro-

[7] As noted earlier (*supra*, p. 5), the Sixth Circuit case is presently pending before this Court on petition for a writ of certiorari, No. 619, this Term. The property seized and sought to be forfeited there, it should be noted, include "$305,633.25 in cash, a package containing an unknown amount of currency, three Buick automobiles, and three adding machines" (392 F. 2d at 674).

ceeding against property used in a gambling business without payment of the prescribed taxes, the government may be awarded a judgment of forfeiture even though no person is—or can be—criminally convicted for the violation giving rise to the forfeiture. Similarly, it is irrelevant whether the owner of the property forfeited would share any criminal responsibility, without regard to the Fifth Amendment. The plain purpose of Section 7302 is to make the property used in violation of the revenue laws the offending thing, and to remove that property from circulation.

Since forfeiture proceedings are *in rem* in nature, they have only a peripheral relationship to the privilege against self-incrimination, which is uniquely and inherently personal in character. Indeed, it might be argued that the privilege has nothing whatever to do with the instant case, and that, at most, only a due process question—relating to the deprivation of property—is potentially involved. Moreover, proof that the particular property sought to be forfeited was intended for use or was in fact used in the business of wagering will often depend on evidence entirely apart from that relating to non-payment of the prescribed taxes. Non-payment is a necessary predicate, to be sure, for a forfeiture proceeding under Section 7302. But such non-payment can ordinarily be proved by government records and the testimony of revenue officials. Engagement of an individual in the wagering business is also, in this context, a necessary predicate for a forfeiture of property under Section 7302. But that can be shown in a variety of ways many of which have nothing whatever to do with the use of particular

property in such activity.[8] Conversely, showing that certain property—whether money or items of personalty like cars—were used in connection with wagering activities frequently requires proof of a rather different character. It is not enough to show that someone engaged in a business subject to a certain tax and that the prescribed taxes have not been paid. It must be shown that the particular property of which forfeiture is sought was used in that sort of illegal business, and thereby became the offending thing against which the *in rem* proceeding is directed. Once these considerations are recognized, it becomes clear that a claim of privilege to protect against such a forfeiture is at best a rather attenuated one.

C. FORFEITURE PROCEEDINGS UNDER 26 U.S.C. 7302 DO NOT VIOLATE THE UNDERLYING SPIRIT OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

Even if the rationale of *Marchetti-Grosso* is held to have no direct application to forfeiture proceedings, a question may remain whether the underlying spirit of the privilege against self-incrimination is violated by forfeitures in the wagering tax context, or indeed under 26 U.S.C. 7302 generally. In recent years this Court has broadly stated that the privilege is undermined if a "penalty" is attached to its invocation. See, *e.g., Griffin* v. *California,* 380 U.S. 609, 614. Although a "penalty" for this purpose has been

[8] Compare the forfeiture statute involved in *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, described by the Court as having the object of penalizing for the commission of offenses, and thus "quasi-criminal" in nature, with the reasons underlying 26 U.S.C. 7302, as articulated by the Sixth Circuit in *One 1965 Buick* and discussed *supra*, pp. 22–23.

characterized as anything which "cuts down on the privilege by making its assertion costly (*ibid.*), no precise meaning has been given to the concept, and actual application of the notion, outside the criminal context, has been limited. It has been applied, we recognize, in circumstances where the "penalty" involved for invocation of the privilege was the loss of a means of livelihood. *Spevack* v. *Klein*, 385 U.S. 511; *Gardner* v. *Broderick*, 392 U.S. 273; *Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280. But in none of those cases, which arose outside the criminal context, did the Court conclude that an individual could automatically bring himself within the Fifth Amendment's shield by simply claiming that some "penalty" had been imposed upon his invocation of the privilege. Cases like *Campbell Painting Co.* v. *Reid*, 392 U.S. 286, make that quite clear (see the discussion *supra*, pp. 20–21).

Moreover, in *Spevack*, *Gardner* and *Sanitation Men* the Court recognized that there were circumstances in which what otherwise might be described a "penalty" could lawfully be imposed upon an assertion of the privilege. What was important, the Court in those cases appeared to suggest, was the substantiality of the countervailing governmental interest in obtaining the information, when balanced against the significance of the "penalty" involved.[9] A "penalty" such as

[9] See *Spevack*, 385 U.S. at 519–520 (concurring opinion of Mr. Justice Fortas); *Gardner*, 392 U.S. at 278; *Sanitation Men*, 392 U.S. at 284. Compare *Garrity* v. *New Jersey*, 385 U.S. 493, where the Court held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution against the witness involved.

dismissal from public employment could be imposed, the Court concluded, so long as the result was not to "requir[e] relinquishment of the benefits of the constitutional privilege" (*Sanitation Men,* 392 U.S. at 284. And, as the Court pointedly stated in *Schmerber* v. *California,* 384 U.S. 757, 762, "the privilege has never been given the full scope which the values it helps to protect suggest." See also *Ullmann* v. *United States,* 350 U.S. 422; *Orloff* v. *Willoughby,* 345 U.S. 83; *Maryland* v. *Soper,* 270 U.S. 9.

Here whatever "penalty" might be thought to result from forfeiture is an even more attenuated one than the Court indicated it might sanction in *Spevack, Gardner,* and *Sanitation Men.* One engaged in wagering without complying with the federal tax laws runs the risk that he may forfeit the property which has been used in connection therewith. Those laws remain valid despite *Marchetti-Grosso,* and forfeiture proceedings are a traditional way of enforcing such provisions. If the taxes involved can be collected in a civil proceeding, forfeiture of property used in violating the taxing provisions is similarly appropriate, and consistent with the Fifth Amendment. Forfeitures in the circumstances here involved do not significantly "cut down" on the "values" which the privilege seeks to protect. Indeed, by virtue of *Marchetti-Grosso* a gambler is effectively immunized from criminal prosecution for non-compliance with the wagering tax laws. As a result of this insulation from criminal sanction, he is accorded "the benefits of the constitutional privilege" (*Sanitation Men,* 392

U.S. at 284) to which, under the Fifth Amendment, he is entitled. There is nothing unconscionable about requiring him to run the risk that property used in carrying on a business which, under the federal tax laws, is illegal because of non-payment of the prescribed taxes, might be subjected to forfeiture. The privilege cannot be converted into a license to own and use property in violation of valid taxing provisions.

Finally, as noted earlier (*supra,* p. 14), 26 U.S.C. 7302 is not applicable to the wagering tax laws alone. It provides broadly for the forfeiture of any property used in violation of the federal tax laws generally, unless covered by another specific provision. If Section 7302 is construed as imposing a "penalty" in the wagering tax context, it is difficult to understand why it is not similarly "penal" in other tax contexts to which it applies, for it would appear no more, nor no less, "penal" in one context or the other. Yet, it is only if it is viewed as imposing an impermissible "penalty" that the privilege comes into play. If Section 7302 is so construed, it would be tantamount to determining that forfeitures, except perhaps of contraband, could not be accomplished without proceedings having all the safeguards of a criminal trial, and the entire statutory forfeiture procedure, long sanctioned by this Court (see *supra,* p. 15), would be rendered nugatory. Such a result, we submit, is hardly one that is constitutionally required by the underlying spirit of the Fifth Amendment's privilege

against self-incrimination, in the wagering tax context or otherwise.[10]

II. AT ALL EVENTS, THE RATIONALE OF MARCHETTI-GROSSO SHOULD NOT BE APPLIED RETROACTIVELY TO CASES IN WHICH THE SEIZURE OF PROPERTY SUBSEQUENTLY FORFEITED TOOK PLACE PRIOR TO THE DATE OF THOSE DECISIONS

If the Court should disagree with our construction of *Marchetti-Grosso* in regard to forfeiture proceedings, we urge that the rationale of those decisions should at all events be applied only to cases in which the seizures of property subsequently forfeited took place after this Court decided those cases. Although we have not urged the non-retroactivity of the *Marchetti* and *Grosso* cases with respect to *criminal convictions* which had not yet become final at the time those decisions were rendered, we suggest that forfeitures of property entail different considerations which militate

[10] In a related context, involving the Fourth Amendment, this Court gave at least implicit approval to forfeiture proceedings directed against offending property. Thus, in *Cooper* v. *California*, 386 U.S. 58, the Court concluded that a search of an impounded automobile was reasonable under the Fourth Amendment, and thus lawful, because under State law it was subject to forfeiture (see 386 U.S. at 60–62). In *Cooper*, therefore, the existence of a forfeiture law served to justify a search that otherwise would have been violative of the Fourth Amendment. Compare *Preston* v. *United States*, 376 U.S. 364. Indeed, even the dissenting opinion in *Cooper* appeared to recognize the validity of the State forfeiture statute (see 386 U.S. at 63).

against a general rule of retroactivity with regard to forfeiture proceedings arising out of wagering tax violations. As to forfeitures, *Marchetti-Grosso,* if they apply at all, should apply to seizures after January 29, 1968, the date of those decisions.

Three years ago, this Court ruled that there is no impediment—constitutional or otherwise—to applying new constitutional formulations in a prospective manner. *Linkletter* v. *Walker,* 381 U.S. 618. The Court there concluded that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make [a new] rule prospective" (381 U.S. at 628), and that, in deciding whether a new constitutional rule should be applied retroactively, the particular situation must be assessed in three respects—"the purpose of the [new] rule; the reliance placed upon the [prior] doctrine; and the effect upon the administration of justice of a retrospective application of [the new doctrine]" (381 U.S. at 636; see also *Stovall* v. *Denno,* 388 U.S. 293, 297, where these criteria are restated in substantially similar fashion.)[11] In the dis-

[11] This approach has consistently been followed and has been expanded upon by this Court in subsequent cases involving questions of retroactivity versus non-retroactivity of newly fashioned rules. See, *e.g., Tehan* v. *Shott,* 382 U.S. 406; *Johnson* v. *New Jersey,* 384 U.S. 719; *Stovall* v. *Denno,* 388 U.S. 293; *DeStefano* v. *Woods,* 392 U.S. 631. Moreover, it should be noted that, while the holdings in *Linkletter* and *Tehan* "were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered," the Court in *Johnson* pointed out that those prior applications had been made

cussion below, we do not address ourselves to an evaluation of the first consideration—the purpose of the new rule. This Court has fully explored the purpose and meaning behind the Fifth Amendment privilege against self-incrimination in recent cases touching that area,[12] and we do not attempt to minimize the significance ascribed to the privilege in those and related decisions. What we do stress here—as we have emphasized above—is that forfeitures of property under 26 U.S.C. 7302, which are *civil* actions *in rem* in nature, directed at the offending *property,* and which are often occasioned by circumstances unrelated to the owner's personal privilege against self-incrimination, are significantly different from criminal convictions—even if forfeitures are viewed as falling within the ambit of *Marchetti-Grosso.* In this context, we submit, the purpose of the new rule should, on balance, yield to the second and third considerations,

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"without discussion" and before the Court had actively focused upon the problem (*Johnson*, 384 U.S. at 732). In *Johnson*, *Stovall* and *DeStefano* the Court indicated that cases still on direct appeal and those involving collateral proceedings were to be treated identically, insofar as the applicability of the new rule was concerned. Indeed, in *Stovall*, the Court flatly stated that "no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review" (388 U.S. at 300). Accordingly, the fact that Angelini is attacking the judgment of forfeiture directly, rather than collaterally, is of no consequence.

[12] See, *e.g.*, *Malloy* v. *Hogan*, 378 U.S. 1; *Griffin* v. *California*, 380 U.S. 609; *Tehan* v. *Shott*, 382 U.S. 406; *Miranda* v. *Arizona*, 384 U.S. 436.

namely, the *reliance* placed upon the prior doctrine, and the *effect* that a retrospective application of the new doctrine would have upon the proper and effective administration of justice, should these factors be viewed as conflicting here.[13] Cf. *Tehan* v. *Shott*, 382 U.S. 406, 413–416; *DeStefano* v. *Woods*, 392 U.S. 631, 634–635.

In 1953, this Court concluded that the Fifth Amendment privilege against self-incrimination did not constitute a defense to prosecutions based on willful failures to register and pay the special occupational tax as required by Sections 4411 and 4412. *United States* v. *Kahriger*, 345 U.S. 22. That holding was reaffirmed in 1955. *Lewis* v. *United States*, 348 U.S. 419. Since 1956, in reliance upon those decisions, $6,686,098.22 worth of money and property has been

[13] Should the Court ground a decision upholding the view of the court below that forfeiture proceedings in the wagering tax context are inconsistent with the privilege, not upon *Marchetti-Grosso*, but upon the notion that an impermissible "penalty" upon the assertion of the privilege under the rationale of *Griffin* v. *California*, 380 U.S. 609, thereby results (see the discussion *supra*, pp. 25–29), an even stronger argument for non-retroactivity is available by virtue of this Court's decision in *Tehan* v. *Shott*, 382 U.S. 406, which held *Griffin* non-retroactive. While *Tehan* reached only cases on collateral review in this respect, that was simply the result of the Court's not focusing upon the matter and applying *Griffin* to cases still on direct review without consideration (see note 11, *supra*). A like approach, in light of *Johnson*, *Stovall*, and *DeStefano*, would presumably no longer be taken, and a new rule analogous to that adopted in *Griffin* would not be applied retroactively at all, whether a potentially affected case was on direct review, as here, or had previously become final (see note 11, *supra*).

seized under 26 U.S.C. 7302 as property used or intended for use in violation of the wagering tax laws.[14] Although there are no reliable statistics indicating what percentage of that property was judicially restored to claimants, or what percentage was eventually returned to claimants by way of remission or mitigation, we think that it is fair to say that, in light of the nature of the criminal activity giving rise to forfeitures in the wagering tax context, a very high percentage of that property was actually forfeited to the United States. Once forfeited, the cash value of the property was treated as collections of internal revenue and was deposited in the general treasury (26 U.S.C. 7406).[15] And the Internal Revenue Service

[14] The Intelligence Division of the Internal Revenue Service has maintained statistics on seizures for violations of the wagering tax laws since 1956. Those figures are as follows:

VALUE OF PROPERTY SEIZED

Fiscal year	Automobiles and other property	Currency	Total
1956	$36,272.98	$58,417.32	$94,690.30
1957	129,004.00	104,841.10	233,845.10
1958	99,956.67	148,078.46	248,035.13
1959	116,335.87	209,198.05	325,533.92
1960	128,421.85	140,647.20	269,069.05
1961	175,383.00	400,795.00	576,178.00
1962	208,914.00	368,874.00	577,788.00
1963	289,288.00	377,191.00	666,479.00
1964	356,608.00	665,020.00	1,021,628.00
1965	326,359.00	860,923.00	1,187,282.00
1966	275,957.69	463,185.25	739,142.94
1967	294,830.35	451,596.43	746,426.78
Totals	$2,437,331.41	$4,248,766.81	$6,686,098.22

[15] In the event that the property seized is not currency, the property—usually automobiles—may, upon proper application, be used by the seizing agency (see 40 U.S.C. 304h, 304i). In the event the property is not used, it is sold at auction and the proceeds are deposited with other currency as collections of internal revenue (26 U.S.C. 7406).

has advised us that during the past seven years alone (fiscal years 1961–1967), 1080 automobiles have been seized as property used in violation of the wagering tax laws.

We do not suggest that all or any of this property would be subject to return regardless of how the court should rule in this case. Presumably, in most of those cases, in view of the existing decisions of this Court, no claim was made that the illegal use of property resulting from failure to pay the prescribed taxes, stemmed from the owner's fear that payment would incriminate him. But see *Grosso* v. *United States,* 390 U.S. 62, 70–71, where the failure to assert a privilege claim as to certain counts was held inconsequential. In any event, the potentialities for a volume of litigation relating to property forfeited in the past, whatever the ultimate outcome,[16] provide a sound and ample practical reason for this Court to make clear that the *Marchetti-Grosso* decisions do not have retrospective application as regards forfeitures. The governmental reliance upon *Kahriger* and *Lewis* in bringing forfeiture proceedings, which is plain, and the substantial burden which would be placed upon the proper and effective administration of justice if the *Marchetti-Grosso* rationale were to be applied retroactively to forfeiture cases, which is demonstrable, combine to justify such a ruling. That is particularly so here,

[16] See *Sultzbach Clothing Co.* v. *United States,* 10 F. 2d 363 (W.D. N.Y.)

where what is involved is not the severity of a criminal conviction or even the loss of one's means of livelihood (cf. *Gardner* v. *Broderick,* 392 U.S. 273), but simply the loss of property which, like "ready cash" used to pay off gambling customers, has been used in the conduct of an illegal business and which may or may not belong to the claimant.

Finally, the proper point of focus for non-retroactive application of *Marchetti-Grosso* to forfeitures is the date of seizure, rather than the date of final judicial determination in the forfeiture proceeding. Under forfeiture law, title vests in the United States as of the date of offending use. See *United States* v. *Stowell,* 133 U.S. 1. As a practical matter, however, the date of seizure fixes the time when the United States takes effective control of that property, and the subsequent judicial action is simply a means of confirming that title. The action of government agents in seizing property used in violation of the wagering tax laws was valid under the decisions of this Court as of the date of seizure and title validly vested in the United States as of that date. In sum, the *Marchetti-Grosso* decisions should in any event not be applied retroactively to divest the United States of title to property thus validly acquired.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment below should be reversed,

and that the judgment of forfeiture to the United States should be ordered reinstated.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $2,674.00,

and

DONALD J. ANGELINI,
Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE CLAIMANT-RESPONDENT

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Claimant-Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 539-0301

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00,

and

DONALD J. ANGELINI,

Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE CLAIMANT-RESPONDENT

I.

STATEMENT OF THE CASE.

The government's analysis of the "bulk of the testimony on trial" is oversimplified. It is set forth in more precise fashion in the June 29, 1967, decision in this cause

by the United States Court of Appeals for the Seventh Circuit (A. 13-14), which decision was later vacated. (A. 19) In regard to the government's footnote No. 1 (P. 4, its brief) it should be noted that on Petition for Certiorari relating to Mr. Angelini's conviction in 1964, he urged the unconstitutionality of 26 U.S.C. §4411 and 4412 (*Angelini* v. *United States*, No. 377, October Term, 1965), as he had on appeal to the Seventh Circuit (346 F. 2d 278).

SUMMARY OF ARGUMENT

The underlying rationale of the privilege against self-incrimination, as recognized in this court's decisions in *Marchetti* v. *United States*, 390 U.S. 39 and in *Grosso* v. *United States*, 390 U.S. 62, precludes the forfeiture of property used or intended to be used in violation of 26 U.S.C. 4411, 4412, and 4901.

The relationship of the personal privilege against self-incrimination to proceedings to forfeit property is an intimate one, recognized by this court and by the Congress of the United States.

In forfeitures of property not contraband per se, the intent of the possessor is decisive. And the very provisions of Title 26, U.S.C., 7302, articulate the importance of that intent. Illegal intent by the possessor is necessary to validate the forfeiture. The only illegal act or intent of the possessor here is a failure to register and pay the tax imposed by Title 26, U.S.C., Section 4411 and 4412. This court in *Marchetti - Grosso* found the requirements of those sections, as they are enforced by the Internal Revenue Service, clearly incriminatory under both state and federal law and, therefore, in the present posture of those statutes, constitutionally unenforceable.

The only intent that can be assigned to the possessor of the property here was an election not to waive rights

and privileges secured under the Fifth Amendment to the Constitution of the United States. The illegal intent necessary to the proof of the forfeiture of this property cannot be found in the refusal or omission to waive constitutional safeguards.

II.

Complete or limited retroactivity constitutes the rule governing the implementation of the decisions of this court. Complete prospective application of its decision, as urged by the government here, can result only from overwhelming countervailing consideration. The government presents false considerations in urging this court to adopt complete prospective application. The government's "reliance" in forfeitures on the doctrines of *Kahriger* and *Lewis* is not "plain" as the government suggests; reliance was entirely on the statutes (Title 26, U.S.C., §4411 and §4412), as it was with forfeitures before those cases. The urging of a burden on the administration of justice, bottomed only on the argument that spurious, unsuccessful suits will be brought by persons with small, if any, chance of prevailing, is unimpressive to the point of unrealism. Further, it is not this Court's wont to anticipate circumstances (here the threat of a deluge of ill-fated actions) that most probably will never arise. It will settle problems and questions in the administration of justice only when they become — if ever they do — troublesome.

ARGUMENT

1. *The underlying rationale of the privilege against self-incrimination, as recognized in this Court's decisions in Marchetti and Grosso precludes the forfeiture of property used or intended to be used in violation of Title 26 U.S.C. §4411, §4412, and §4901.*

a. The forfeiture laws respecting property not contraband per se are punitive, and addressed to the individual.

The government's whole argument is a divorcement of the property from the owner and possessor, and an insistence that the forfeiture remedies a wrong.

The impersonal nature of the proceeding as urged by the government finds its core at p. 24 of its Brief, where it says:

> "Since forfeiture proceedings are *in rem* in nature, they have only a peripheral relationship to the privilege against self-incrimination, which is uniquely and inherently personal in character."

This court long ago recognized the "relationship of the personal privilege against self-incrimination to proceedings to forfeit property", and found it intimate and not "peripheral".

> "In *U. S.* v. *Mason*, Judge Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. *But where the owner of the property*

has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; *for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited;* and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' *

* * *

"But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense." *Boyd* v. *United States*, 116 U.S. 616, 637-638. (Our Emphasis)

That statement by this Court should suffice to overcome the neuter argument of the government, and on the sole basis of the law as set forth in *Boyd*, the decision of the Seventh Circuit herein should be affirmed. However, the government seems to be urging this court to overrule *Boyd*, even though it has been reaffirmed time and again by this Court. Moreover, the history of legislation dealing with the Fifth Amendment and the application of the privilege of the possessor to forfeiture proceedings is firmly established.

By broadest implication this Court has urged, for effective enforcement of its excise and occupational taxes relating to wagering, that the Congress immunize the registrant

and taxpayer against incrimination. Assuming the Congress found it feasible to immunize, it is not conceivable that the cloak of immunity would not also run to forfeitures, a clear indication that the Congress considers the breadth of the Fifth Amendment to extend to this type of proceeding. The scope of the immunity to be given informer statutes beginning in 1890 up until July of last year clearly demonstrates the understanding of the lawmakers.

We have set forth hereinbelow the breadth of the immunity granted by the Congress under sixteen (16) statutes. This is not truly representative of the number of proceedings to which the immunity relates, because of inclusion of the provisions by reference in other statutes:

". . . but no individual shall be prosecuted or subjected to any penalty or *forfeiture* for or on account of any transaction, matter, or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence, . . ." (Title 47 U.S.C. §409, originally enacted June 19, 1934); also see Title 16 U.S.C. §825f(g), June 20, 1920; Title 12, U.S.C.§1820(d), September 21, 1950; Title 50, App. §1152(4) originally enacted June 28, 1940; Title 15 U.S.C., §78u(d), originally enacted June 6, 1934; Title 15, U.S.C. §80a-41(d) originally enacted Aug. 22, 1940; Title 15 U.S.C. §80b-9(d), originally enacted August 22, 1940.

"No person shall be prosecuted or be subjected to any penalty or *forfeiture* . . ." etc. (Title 15, U.S.C. §32, Feb. 25, 1903); "But no person shall be prosecuted or subjected to any penalty or *forfeiture* for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . ." (Title 49 U.S.C. §43, originally enacted Feb. 19, 1903, and Title 42 U.S.C. §405(f), §46, Feb. 11, 1893);

"No such witness shall be prosecuted or subjected to any penalty or *forfeiture* for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence . . ." (Title 18 U.S.C. §2514, July, 1968); also see Title 18, U.S.C. §3486(a), August 20, 1945; also see Title 18 U.S.C. §1406, July 18, 1956; "But no natural person shall be prosecuted or subjected to any penalty or *forfeiture* . . ." (Title 46, U.S.C. §827, originally enacted September 7, 1916); see also Title 15, U.S.C. §49, Sept. 26, 1914.

Thus it is seen that historically our law-makers recognized that the privilege is intimately involved in forfeitures.

The next aspect of the government's argument is an insistence that forfeiture remedies a violation of federal law and that one of the main reasons for the forfeiture laws is to seize and destroy property used in the violation of the tax laws relating to the manufacture of liquor, tobacco, firearms, and contraband, and thus remove such property from circulation. The government even suggests that such destruction would have effectuated the prohibition laws. We trust the suggestion was not made regretfully. But we are here dealing with money. Certainly the money is not to be seized and destroyed. The government seems overly interested in stamping out gambling, rather than the collection of taxes. It seems to forget that gambling is not made illegal under federal law. It is the State's responsibility to control gambling. It is rather the government's obligation to stimulate revenue in a manner consistent with the rights of the individual. Destruction of the property here (which we know the government has no intention of doing) implements no valid tax law.

The government contends that the forfeiture statutes operate merely to correct a tax violation (p. 17). Here the violation to be "remedied" is payment of a $50.00 occupational tax. But none of the $8,674.00 has been applied to satisfaction of that tax. The government itself assessed the claimant for that tax, and it has, under protest, been paid. The government's action is wholly at odds with its argument.

b. The intent of the possessor is essential to the forfeiture of property not contraband per se.

Contrary to the government's argument it is not the property itself that is the offender (See p. 13), it is the intent of the possessor that offends.

The government has argued with some redundance that property may be forfeited notwithstanding the lack of criminality in the owner-claimant and without regard to the *conviction* of the offender. However, the government's argument carefully skirts the intent of the possessor. It is well established that the intent of the possessor is the decisive factor in determining whether the property was intended for use in violating the provisions of the Internal Revenue Laws. The wording of the statute (Title 26, U.S.C., Section 7302) clearly makes the intent of the possessor necessary to forfeiture.

> "It shall be unlawful to have or possess any property *intended* for use in violating the provisions of the Internal Revenue Laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property . . . " (Emphasis ours)

Thus the Seventh Circuit, out of which this case arose, so held in its analysis of the predecessor to Section 7302:

> "A reading of Sec. 3116, as well as the cases where it has been applied, indicates that the material factor

is the intention of the possessor of property, in the instant case the truck." *United States* v. *One 1942 G. M. C. Tractor Truck*, 7 Cir. 182 F.2d 278, 282.

"Intent" of the possessor is again emphasized by the Eighth Circuit decision in *United States* v. *Windle*, 158 F. 2d 196, where it makes it clear that the predecessor to this section "authorizes forfeiture on proof merely of intent to commit a crime and although commission of that crime is not required to be proved, perhaps the most probative evidence of that intent lies in proof of actual commission of the offense." (158 F.2d at 199)

In *United States* v. *2265 One-Gallon Parafin Tin Cans*, 260 F. 2d 105, the Fifth Circuit emphasized the necessity of proof of illegal intention of the possessor. (260 F. 2d 107)

The emphasis in the government's brief of the possibility of an innocent intent by an owner-claimant, to the utter disregard of the intent of the possessor, presents a false issue, for illegal intent by the possessor was necessary to proof validating the forfeiture.

The government's argument is wholly at odds with the clear wording of the Statute. "It shall be unlawful to have or possess . . ." (26 U.S.C. §7302). To satisfy the wording there must be a haver, there must be a possessor.

It would seem that this court in *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693 made clear the distinction between per se contraband and the forfeiture of property, such as the money here involved. It discussed with clarity forfeitures concerning objects, the possession of which, without more, constitutes a crime, and the repossession of which would constitute another crime. Like the Plymouth, there is nothing remotely criminal in possessing money. It is only the use to

which the money was put or was intended to be put that subjects the claimant to its possible loss. Since this is property not intrinsically illegal in character, it becomes "derivative contraband" only from the acts of the possessor. The return of the money to the owner-claimant would not subject him to any possible criminal penalties for possession or frustrate any public policy concerning money, as money. It is only his act or omission that makes the money subject to forfeiture, and it is inconceivable that property would become 'derivative contraband' on proof that the use that gave it its contraband nature was the exercise of a constitutional right." (See 380 U.S. at 699)

c. Illegal intent cannot be found in an omission to waive constitutional rights.

This court did not overlook the power of the Congress to tax, nor the necessities of government to raise revenue. It said it just couldn't be done in this way.

> "We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." *Marchetti* v. *United States*, 390 U.S. 39, 59-60.

Those values are in no wise minimized by the form of sanction, where the act required to avoid sanction is repugnant to the constitution.

> Here, as in *Marchetti*, the statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities. The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers, United States v. Calamaro, 354 U.S. 351, 358, 77 S. Ct. 1138, 1143, 1 L.Ed. 2d 1394; but we cannot ignore either

> the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made. These collateral circumstances, in combination with Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities, readily suffice to distinguish these requirements from those at issue in *Shapiro. Grosso* v. *United States,* 390 U.S. 62, 68.

The government argues:

> "One engaged in wagering without complying with the federal tax laws runs the risk that he may forfeit the property which has been used in connection therewith." (Page 27, Its Brief)

As has been brought out forcibly by this court's decisions in *Marchetti* and *Grosso* compliance with the federal tax laws here involved, 4411 and 4412, is clearly incriminatory. The governments statement, therefore, that forfeiture may ensue from a refusal to comply is at direct odds with this Court's decision and clear language in *Garrity* v. *State of New Jersey* as follows:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.
>
> • • •
>
> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *State of New Jersey,* 385 U.S. 493, 497, 500.

As this court said in *Griffin* v. *State of California,* 380 U.S. 609, this constitutes the imposition of a sanction which makes assertion of the Fifth Amendment privilege

"costly". (380 U.S. at 614) And most particularly in this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." (385 U.S. 511, 516)

Neither are gamblers excepted from the words "no person . . . shall be compelled in a criminal case to be a witness against himself," and gamblers too, like lawyers, enjoy first class citizenship. See *Spevack* v. *Klein*, *Supra*.

The tortured interpretation given *Boyd* by the government—to equalize it with the common law concept of forfeiture—must be discarded. The government takes some comfort out of the fact that the provision for forfeiture was included in the sanctions for the crime, that is, that certain acts of fraud committed against the public revenue in relation to imported merchandise made the offender subject to a fine not exceeding $5,000.00 and imprisonment up to two years, "and in addition to such fines, such merchandise shall be forfeited." The language in 28 U.S.C. 7302 says:

> "It shall be unlawful to have or possess any property . . ."

The placement of the sanction does not make it less efficacious, nor divorce it from the provisions upon which it depends. As a matter of fact, general penalties statutes or provisions are overwhelmingly common, too common for the government to effect a false distinction.

Further, the distinction the government attempts to make on the basis that *Boyd* and *Plymouth* had "Fourth Amendment implications" as opposed to Fifth Amendment "implications" is fatuous. Boyd made clear that the

Fourth and Fifth Amendment are so interconnected that the protection of the Fourth, the compulsion to produce books and papers is, in fact, compulsory self-incrimination. *Boyd* said this clearly at pages 634-5:

> "a compulsory production of the products, books, and papers of the owner of goods sought to be forfeited in . . . a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

Boyd based its exclusion of unlawfully seized evidence squarely on the specific prohibition of the Fourth and Fifth Amendments. And as this court said in *Mapp* v. *Ohio*, 367 U.S. 643 at 646:

> "the Fourth and Fifth Amendments run almost into each other."

And again in *Mapp*, this court said that the use of illegally seized evidence is "tantamount to coerced testimony." (367 U.S. at 656)

The only intent of the possessor here was an intent not to waive rights and privileges secured under the provisions of the Fifth Amendment to the Constitution of the United States. His election was to refuse to prove his own guilt to avoid admitting it. *United States* v. *Kahriger*, 345 U.S. 22, 34. Illegal intent cannot be found in a refusal or omission to waive constitutional safeguards.

> ". . . if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such references bottomed on what must ordinarily be a fiction, have precisely

the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See e.g., Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70. Compare Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; and Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.' Morgan, The Privilege against Self-Incrimination, 34 Minn.L.Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease wagering or to provide information incriminating to themselves and have ultimately elected to do neither.'' *Marchetti v. United States*, 390 U.S. 39, 51-52)

2. ***This judgment can be reversed only in violation of the law as recognized in Marchetti-Grosso. Strict prospective application of the law—in contravention of the basic rule giving retrospective application to this Court's decisions—will only be indulged in the presence of overwhelming countervailing considerations. They do not exist here.***

The government urges this Court to declare that the *Marchetti-Grosso* rationale be applied to forfeitures only to cases tried after this court's ruling in those cases.[1] It urges in support of its position that recent cases of this court have limited newly adopted criminal rules, which do not bear on the integrity of the guilt-determining process, to prospective application.

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[1] It seems fairly obvious there will be none.

What the United States overlooks in evaluating those cases is that they are exceptions to the rule of complete or limited retroactivity, and prospective application resulted only because of overwhelming contravailing considerations. The first case relied on, *Linkletter* v. *Walker*, 381 U.S. 618, made that eminently clear. It cited Mr. Justice Holmes dissent in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, disclaiming knowledge of any authority for making law only for the future, and emphasizing that judicial decisions have had retrospective application "for near a thousand years." (fn. 6, 381 U.S. at 622). The case emphasized the distinction between new law and true law, and true law is the essence of *Marchetti-Grosso*. It is old law that a man may not be compelled to incriminate himself; it is old law that he cannot be punished for refusing self-incrimination. But it also recognized that when a case wrongly decided (here *Kahriger-Lewis*) is overruled, intermediate cases "finally decided" are not to be disturbed. But this case is not finally decided. The moneys here have not been definitely condemned (381 U.S. at 625-626), and should be restored.

After a complete review of the history regarding the question, this Court concluded:

> "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy, supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations * * * and particular conduct * * * of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' Chicot County Drainage

Dist. v. Baxter State Bank, supra, 308 U.S., at 374, 60 S.Ct. at 319." *Linkletter* v. *Walker*, 381 U.S. 618, 627.

It would seem that (1) above would conclude the Government's argument as to this case, and (2) is, at least, purely anticipatory.

Recently the United States Court of Appeals for the Second Circuit, sitting en banc, recognized retroactivity as the basic rule, when faced with the recently recurring urgings of the United States for prospective application only, but it continued in analysis of the cases urged there as they are here, as standing to justify prospective application:

"In *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n. 3 (1966), the Court similarly treated the rule announced in *Griffin* v. *California*, 380 U.S. 609 (1965), which forbade adverse comment by prosecutors and judges on the failure of a defendant to testify in a state criminal trial. However, relying on the later-decided opinion in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Government counters that the Supreme Court did not realize what it was doing in the earlier decisions discussed above. The Government claims that 'if the Court had ever considered the question squarely' in those earlier decisions, it would have ruled the other way. However, a careful consideration of even the cases relied on by the Government and of the underlying considerations leads us to reaffirm *Sheller*.

In *Stovall* v. *Denno*, *supra*, the Supreme Court considered the retroactivity of the rules announced in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), which required 'the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel.' 388

U.S. at 294. The Court pointed out, *id.* at 296-97, that the *Linkletter, Tehan,* and *Johnson* cases

> 'establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ." [Citation omitted.] The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'

"Applying these criteria in *Stovall,* the Court held that the new rules were prospective only and refused to distinguish between 'convictions now final . . . and convictions at various stages of trial and direct review.' It regarded 'the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable.' *Id.* at 300-01. The analysis in *Johnson* v. *New Jersey,* 384 U.S. 719, 726-33 (1966), also relied on by the Government, was similar.

"On the other hand, applying this reasoning to the question in this case, leads to a completely opposite result." *United States* v. *Tarrazo,* 2 Cir., 398 F.2d 621, 623-4.

Extending the *Marchetti-Grosso* rule to forfeiture cases still on appeal when it was announced will place no significant "burden on the administration of justice." In *Stovall* and *Johnson,* the court was obviously concerned that great numbers of cases might be reopened even by limited retroactivity.

The government has made *one* argument in favor of prospective applicability, that is: they have recovered $6.5 million dollars worth of property of which *not even*

a major portion would be subject to return if retroactive application were determined, but nonetheless, it fears the "potentialities" of fruitless litigation. It is unbelievable that private practitioners are not more aware of the futility of senseless litigation than our governmental counterparts, who are on retainer to one client, whatever the case.

There can be no doubt that the government seeks to impress this court by the amounts of money involved—not in this case—but in others. As they felt "it should be noted" that well in excess of $300,000 is involved in *United States* v. *One 1965 Buick*, 6 Cir., 392 F. 2d 672, pending on petition for Writ of Certiorari, No. 619 of this Court, and see also the chart on p. 33, plus the $6 million figure (p. 32).[2] The mere $8600 involved here is embarrassingly insignificant by comparison. Fortunately the Constitutional question is not, and in the light of that question, the term "title to property validly acquired" (pp. 8, 35, its brief) is prepossessing, when used by the government. We have here a Constitutional conflict and none can say a thing was done validly which conflicts with the Constitution. It is, for example, somewhat disquieting that the government should argue "that, at most, *only* a due process question—relating to the deprivation of property is involved." (p. 24, its brief, our emphasis). There is thus raised another substantial Fifth Amendment question.

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[2] We are in no position to comment on the $6.5 million figures (pp. 8, 32, 33, its brief). Their validity is certainly no part of this record. Statistics—and it is admitted these are not reliable statistics (p. 33, its brief)—are more properly presented to the Congress for proper legislation. The preoccupation with large sums constituting forfeitures under these Acts can only have the intent that this Court subserve to indulge expediency, which we are confident will not be done.

Insofar as the government argument is premised on governmental reliance on the doctrine of *Kahriger-Lewis*, we submit this is false. In the absence of *Kahriger-Lewis*, the forfeiture actions would still proceed in reliance on the statutes (26 U.S.C. §4411 and §4412), as they did before those cases. But, even assuming such reliance, that does not raise the countervailing circumstances envisioned by the cases on which the government relies.

No further hearings will have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated, compare *Linkletter* v. *Walker*, 381 U.S. at 637. There is no problem here of "a legalized mass of jail break by rapists, murderers, and other felons." See *Schwartz*, retroactivity reliability and due process: a reply to Professor Mishkin, 33 U.Chi. L.Rev. 719, note 4, page 745.

No argument of reliance by "law enforcement authorities" can validly be made. The respondent monies seized here, were seized as an incident to Mr. Angelini's arrest, for violation of Section 7203 in that he did wilfully fail to comply with Sections 4411 and 4412 of Title 26. Nothing was done in reliance upon former decisions on the search incident to arrest, searches incident to arrest are not affected by this decision. No law affecting the right to search incident to arrest has been changed.

No one is going to give back the sentence Mr. Angelini served, or compensate for it. This notwithstanding his asserted Fifth Amendment defense, rejected on review and later vindicated in Marchetti and Grosso.

In sum, the government says, "our agents forfeited the money in good faith—let us keep it, because your prior decisions led us to believe we were entitled to it. In that way, even though we lose, we win." The argument is valid only if a balm is customary, for that is what this would be.

The government also urges that retroactive application, complete or limited, could or might result in a plethora of suits, destined to failure (pp. 8, 34, Its Brief). We do encounter aimless litigation, doomed to failure, from time to time. But not often. Such isolated instances will probably always be with us. But the threat of a deluge of such suits in the absence of declaring prospective litigation, is unrealistic. Law offices are not kept open on ill-fated law suits.

Further, it is not this Court's habit to anticipate burdens on the administration of justice—even when they are practical, rather than fanciful as here. This Court settles problems and questions in the administration of justice only when they *exist* and only when they become troublesome. *Linkletter* v. *Walker*, 381 U.S. 618, 620.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN JR.
Attorneys for Claimant-Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 8

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI,

Claimant-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF JOSEPH P. LUCIA FOR LEAVE TO FILE A BRIEF AMICUS IN SUPPORT OF CLAIMANT-RESPONDENT

Joseph P. Lucia respectfully moves for leave to file a brief in support of the position of Claimant-Respondent in this cause. The written consent of both the Solicitor General of the United States, and Miss Anna R. Lavin and Mr. Edward J. Calihan, Jr., attorneys for the Claimant-Respondent, Donald J. Angelini, has been obtained and filed with the Clerk of the Court.

Mr. Lucia now has appeals pending on en banc rehearing in the United States Court of Appeals for the Fifth Circuit which turn on the question whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), should be applied retroactively. The fifth circuit panel which initially heard Mr. Lucia's appeals held *Marchetti* and *Grosso* fully retroactive and vacated Mr. Lucia's convictions under the federal wagering tax statutes. *United States* v. *Joseph P. Lucia*, Nos. 26316 and 26317 (5th Cir. Sept. 17, 1969). We have attached a copy of the court's opinion as Exhibit A. On October 2, 1969, the court, on its own motion, ordered the cases reheard en banc.

Angelini turns initially on the question whether the rationale of *Marchetti* and *Grosso* applies to forfeiture proceedings. If these cases are held applicable to forfeiture proceedings, the Court must squarely face the question whether *Marchetti* and *Grosso* are to be retroactively applied. Mr. Lucia's case would be controlled by a general determination of their retroactivity, *i.e.*, one which comprehended both criminal proceedings and forfeiture proceedings.

Angelini presents only the considerations involved in determining whether *Marchetti* and *Grosso* should be applied retroactively to forfeiture proceedings. As the United States has already conceded in *Angelini*, the considerations involved in determining whether *Marchetti* and *Grosso* should be applied retroactively in criminal cases are markedly different from those involved in forfeiture cases. It is possible to conclude, as has the Solicitor General, that they should be applied retroactively in criminal proceedings which were not final by the date of the decisions in *Marchetti* and *Grosso*, and yet should not be applied retroactively in forfeiture proceedings which were not final on

that date. *See* Brief for Petitioner at 29-31. The parties to *Angelini* cannot adequately present the distinctive issues raised in a criminal proceeding. These issues must be before the Court for full consideration of the general question of the retroactivity of *Marchetti* and *Grosso*.

Accordingly, Mr. Lucia respectfully submits that if the Court is to determine the general question of the retro-activity of *Marchetti* and *Grosso*, the considerations involved in a criminal proceeding such as his should be before the Court. Alternatively, Mr. Lucia submits that the considerations involved in a criminal proceeding such as his are so distinguished from those involved in a forfeiture proceeding that the Court's decision in *Angelini* should be specifically limited to forfeiture proceedings, reserving the question of retroactivity in criminal proceedings.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

MARVIN K. COLLIE
HARRY M. REASONER
TRAVIS C. BROESCHE
FRANK F. SMITH, JR.
VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Bldg.
Houston, Texas 77002

Attorneys for Joseph P. Lucia, Amicus Curiae

IN THE

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UNITED STATES OF AMERICA,

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UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI,

Claimant-Respondent.

BRIEF OF JOSEPH P. LUCIA AS AMICUS CURIAE

OPINION BELOW; JURISDICTION AND STATUTE INVOLVED

Amicus adopts Petitioner's statements of the opinion below, jurisdiction and the statute involved.

QUESTIONS PRESENTED

Whether this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39 (1968), and *Grosso* v. *United States,* 390 U.S. 62 (1968), should be applied with full retroactivity in forfeiture and criminal proceedings? Or, alternatively, whether the considerations involved in determining whether *Marchetti* and *Grosso* should be applied with full retroactivity in forfeiture proceedings and in criminal proceedings are so markedly different that only the issue of retroactive application in forfeiture proceedings should be de-

termined in the instant cause, with the question of retroactivity in criminal proceedings reserved?

STATEMENT

Amicus accepts the statements of the parties. However, for consideration of the general question of retroactivity of *Marchetti* and *Grosso*, the Court's attention should be given to the considerations raised by criminal proceedings such as Mr. Lucia's.

On September 18, 1964, Joseph P. Lucia was indicted on various counts for violation of provisions of the federal statutory scheme for taxation of illegal wagering. On September 25, 1964, Mr. Lucia pleaded not guilty to all counts of the indictment. After various pretrial proceedings, Mr. Lucia was rearraigned on January 18, 1965, and pleaded guilty to Count 12 of the indictment charging him with attempting to evade and defeat the excise tax upon wagers he had received by failing to make and file Form 730 (Tax on Wagering Return), by failing to keep records as required by 26 U.S.C. § 4403, and by various other acts of concealment, all in violation of 26 U.S.C. § 7201. The remaining counts of the indictment were dismissed.

That same day, a criminal information was filed charging Mr. Lucia and others with conspiracy to "willfully fail to pay the excise tax on wagers" imposed by 26 U.S.C. § 4401 in violation of 18 U.S.C. § 371. On February 1, 1965, Mr. Lucia pleaded guilty to this charge.

Mr. Lucia was then sentenced to consecutive terms of six months on the conspiracy charge and five years on the evasion charge, with fines of $10,000 imposed for each charge. Mr. Lucia has paid the fines and served the six month sentence. The five year sentence was suspended, but Mr. Lucia remains on probation. He further continues to suffer

various civil disabilities and onerous consequences from his convictions.

After the decisions in this Court in *Marchetti* and *Grosso* were handed down, Mr. Lucia filed motions in the nature of a writ of error coram nobis to vacate and set aside both of the convictions. The district court denied the writs. On September 17, 1969, a fifth circuit panel handed down an opinion holding *Marchetti* and *Grosso* fully retroactive and ordering the causes remanded for vacation of the convictions. *United States* v. *Joseph P. Lucia*, Nos. 26316 and 26317 (copy attached as Exhibit A). However, on October 2, 1969, the fifth circuit, on its own motion, ordered Mr. Lucia's appeals reheard en banc. His appeals are now pending before the fifth circuit.

INTEREST OF AMICUS CURIAE

Mr. Lucia's appeals pending on en banc rehearing in the United States Court of Appeals for the Fifth Circuit turn on the question whether this Court's decisions in *Marchetti* and *Grosso* are to be applied with full retroactivity. *See United States* v. *Joseph P. Lucia*, Nos. 26316 and 26317 (5th Cir. Sept. 17, 1969) at 2; Exhibit A at 2a.

In deciding *Angelini*, the Court must initially face the question whether the rationale of *Marchetti* and *Grosso* is applicable to forfeiture proceedings. If these cases are applicable to forfeiture questions, then the Court must deal with the question of the retroactivity of *Marchetti* and *Grosso*. A general determination of the retroactivity of *Marchetti* and *Grosso* that comprehended both forfeiture proceedings and criminal proceedings could be dispositive of Mr. Lucia's case. Mr. Lucia, therefore, has an interest in urging before the Court the considerations militating in favor of retroactivity in criminal proceedings, if the Court is to determine generally the question of *Marchetti* and

Grosso's retroactivity. Alternatively, if the Court is not disposed to consider the general question of *Marchetti* and *Grosso's* retroactivity, but limits its consideration to the issues raised by forfeiture cases, Mr. Lucia would urge the Court to delimit the rationale of its ruling to forfeiture proceedings, reserving the question whether they are retroactively applicable to criminal proceedings.

ARGUMENT

UNDER THE APPLICABLE CRITERIA SET FORTH BY THIS COURT, THE CONSTITUTIONAL RULE NEWLY RECOGNIZED IN MARCHETTI AND GROSSO SHOULD BE RETROACTIVELY APPLIED.

While there is a dispute as to the degree of the government's burden in urging prospective application, the parties are agreed that the following threefold test annunciated in *Stovall* v. *Denno*, 388 U.S. 293 (1967), is to be utilized for determining whether *Marchetti* and *Grosso* should be applied retroactively:[1]

> "(a) The purpose to be served by the new standards,
>
> "(b) The extent of the reliance by law enforcement authorities on the old standards, and
>
> "(c) The effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

[1] The following definitions of categories of retroactivity are followed in this brief: a new rule is *partially retroactive* when it is applied to all pertinent cases that are in trial or on appeal — *i.e.*, not final — on the date the new rule is announced. A new rule is *retroactive* if it applies not only to all cases in trial or on appeal, but also to all previous judgments even though they are final. To distinguish retroactivity, the former is sometimes referred to as *full* or *total retroactivity*. This emphatic distinction shall be made only where the context makes it desirable.

The parties have limited their application of the *Stovall* test to consideration of whether *Marchetti* and *Grosso* should be retroactively applied in forfeiture cases. Amicus shall limit his argument to the retroactivity of *Marchetti* and *Grosso* in criminal proceedings,[2] Amicus submits that consideration of the question of *Marchetti* and *Grosso's* retroactivity in criminal proceedings reinforces the conclusion that the cases should be given full retroactivity in criminal and civil proceedings. Alternatively, Amicus submits that, if the Court should determine that *Marchetti* and *Grosso* should not be applied retroactively in forfeiture proceedings, the considerations militating in favor of full retroactivity in criminal proceedings are of sufficient

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[2] We are aware of only two cases where courts have treated the question of the retroactivity of *Marchetti* and *Grosso* in criminal proceedings involving alleged violations of the federal wagering tax laws. One, of course, is the fifth circuit panel's decision in *Lucia* (a copy of the opinion is attached as Exhibit A). The other is *Graham* v. *United States*, 407 F.2d 1313 (6th Cir. 1969). In *Graham*, the sixth circuit in a superficial and unpersuasive application of the *Stovall* test held that *Marchetti* and *Grosso* should be applied with only partial retroactivity (*i.e.*, only in causes that were not final as of the date of the *Marchetti* and *Grosso* decisions). *See* 407 F.2d at 1315.

In a different context, the seventh circuit held *Marchetti* and *Grosso* not to be retroactive. *Mackey* v. *United States*, 411 F. 2d 504 (7th Cir. 1969) *petition for cert. filed*, 38 U.S.L.W. 3086 (U.S. Aug. 29, 1969) (No. 529) "[D]efendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes." *Id.* at 509. *Mackey* should not be viewed as having any application to the question of retroactivity in criminal proceedings involving alleged violations of the federal wagering tax laws. As the court said in *Mackey*:

> "Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of *Kahriger* and *Lewis* themselves [citation omitted], who have claimed the privilege and have been convicted of failure to file the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned." *Id.* at 509.

weight and sufficiently distinct to require the Court either to hold the cases fully retroactive in criminal proceedings or to reserve decision until the issue is squarely presented to it.

(1) APPLICATION OF THE STOVALL TEST

(a) The Purpose to Be Served by the New Standards.

The general purpose of the rule in *Marchetti* and *Grosso* is to limit the federal wagering tax statutes to applications "consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment," 390 U.S. at 44. In the context of criminal proceedings, it therefore prevents the punishment of those who fail to comply with the requirements of the federal wagering tax statutes. 390 U.S. at 61. An obvious purpose of this rule is to protect persons from criminal punishment imposed by a statutory scheme that by its very implementation deprives persons of their Fifth Amendment rights. This purpose cannot be fully served without retroactive application. Unless it is applied retroactively, the criminal punishment of those convicted under the relevant federal wagering tax statutes in violation of what the Court now holds to be a right guaranteed by the Fifth Amendment will continue in varying degrees throughout the lives of the convicted parties.

It is important to note that the Fifth Amendment rights recognized in *Marchetti* and *Grosso* are not concerned with merely an evidentiary privilege. *Marchetti* and *Grosso* constituted a recognition that the federal wagering tax scheme made the exercise of a person's Fifth Amendment rights a violation of federal law. These cases place an effective limitation upon the government itself. They are a recognition that the methodology utilized in the federal wager-

ing tax statutes is not consonant with the rights guaranteed by the Fifth Amendment. It follows inevitably that many of those convicted under the federal wagering tax statutes in the past were convicted in derogation of their Fifth Amendment rights. Denial of these rights in the past went to the heart of the prosecution. Recognition of these rights constitutes a complete and effective bar to the governmental proceedings directed towards punishment of the exercise of the Fifth Amendment rights. Recognition of the retroactivity of *Marchetti* and *Grosso* will permit at least a partial purging from our history and our jurisprudence of convictions obtained by a process repugnant to our Constitution.

In contrast with *Marchetti* and *Grosso*, cases where retroactivity has been denied have been those where retroactive application would not serve the purpose of the rule. For example, the purpose of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was to prevent unconstitutional searches and seizures. In denying retroactive application of *Mapp*, *Linkletter* v. *Walker*, 381 U.S. 618 (1965), correctly concluded that this purpose would not be served by retroactive application. Said the Court:

> "The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved. . . . [T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Id.* at 637.

See also Fuller v. *Alaska*, 393 U.S. 80, 81 (1968), which held *Lee* v. *Florida*, 392 U.S. 378 (1968), prospective only. Like *Mapp*, the purpose of *Lee* was to enforce the federal law in the future (§ 605 of the Federal Communications Act, 47 U.S.C. § 605).

Another example is the rule of *Griffin* v. *California*, 380 U.S. 609 (1965), which prevents adverse comments on a

defendant's failure to testify. The purpose of this rule is similar to that of *Mapp's* — to protect "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life. . . .'" *Tehan* v. *United States*, 382 U.S. 406, 416 (1966). Like *Mapp's* purpose, "a variant from . . . [*Griffin's*] standard cannot now be remedied." *Id.*

Unlike the purposes of *Mapp*, *Griffin* and *Lee*, which are primarily the preservation of one's privacy and the assurance of the future observance of federal law, *Marchetti* and *Grosso* are designed to prevent criminal punishment from being incurred due to the exercise of a constitutional right. While the purpose of *Mapp*, *Griffin* and *Lee* would not be served by retroactivity, it is clear that the purpose of *Marchetti* and *Grosso* would be served by retroactivity.

(b) The Extent of the Reliance By Law Enforcement Authorities on the Old Standards.

It is true that the Supreme Court has previously upheld the federal wagering tax statutes involved in *Marchetti* and *Grosso* against Fifth Amendment attack. *Lewis* v. *United States*, 348 U.S. 419 (1955); *United States* v. *Kahriger*, 345 U.S. 22 (1953). Federal law enforcement officials have, no doubt, relied upon these cases to continue the prosecution of violators of the federal wagering statutes. However, this highly limited and specific reliance is the only kind conceivably involved. The constitutional rule duly recognized in *Marchetti* and *Grosso* will affect only convictions that were obtained under the federal wagering tax statutes in derogation of the defendant's Fifth Amendment rights. Convictions obtained under any other substantive statutes will not be affected. Only federal law enforcement authorities are involved, since no state statutes are within the ambit of the new rule. Federal law enforcement authorities can scarcely be heard to base a complaint

upon their past reliance. The only convictions that could conceivably be upset would be those where the very violation for which the defendant was prosecuted was caused by the defendant's exercise of his rights under the Fifth Amendment.

In all the situations in which full retroactivity has been denied by this Court, the police and the prosecution could have behaved differently, and could have obtained a conviction by constitutional means, had they had the prescience to know what the Constitution required of them. If *Mapp* had been on the books, the police could have obtained warrants. If *Miranda* had been on the books, the requisite warnings could have been given or the police could have sought evidence other than a confession. If *Griffin* had been on the books, prosecutors could have avoided comment on the defendant's failure to testify. If *Lee* had been on the books, state prosecutors could have avoided offering evidence obtained in violation of § 605 of the Federal Communications Act, 47 U.S.C. § 605. If *Wade*[3] and *Gilbert*[4] had been on the books, lineups would have been conducted in a different way. If *Duncan*[5] and *Bloom*[6] had been on the books, trials would have been to a jury. To have made these landmark decisions fully retroactive would have meant, to paraphrase Judge Cardozo's famous remark, that the criminal must go free because the constable has blundered, even though there was no way the constable could have known he was blundering.

The present situation is wholly different. If *Marchetti* and *Grosso* had been decided four years earlier, there is no way that Mr. Lucia could have been successfully prose-

[3] *United States* v. *Wade*, 338 U.S. 218 (1967).
[4] *Gilbert* v. *California*, 388 U.S. 263 (1967).
[5] *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).
[6] *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

cuted. No alternative would have been open to the prosecuting authorities, *since here the constitutional defect does not go to the method by which a crime is proved but to whether the conduct can constitutionally be made criminal.* In this circumstance there can be no weight given to reliance on the former decisions.

(c) The Effect on the Administration of Justice of a Retroactive Application of the New Standards.

The strongest indication that *Marchetti* and *Grosso* should be retroactive is the fact that their retroactivity would have only a minimal effect on the administration of justice. This is in sharp contrast to cases where retroactivity has been denied. The retroactive application of *Marchetti* and *Grosso* would concern only the very limited area of federal criminal law dealing with federal regulation of wagering. Retroactive application here would not open wide the jail doors. Prison sentences for wagering tax violations have been comparatively rare and almost always short. According to *Federal Offenders in the United States District Courts*, 1965, pp. 84-85, *ibid.*, 1966, Table D. 9, and *ibid.*, 1967, Table D. 7, of the 1936 persons convicted in federal courts in those three years of wagering tax violations, 1670 received either a suspended sentence, a fine, or probation. Only 266 were given jail sentences. The jail sentences of 171 offenders were for six months or less, and 70 other defendants received sentences ranging from seven to twelve months. Only 25 persons, then, were sentenced for more than one year. Of these, 10 sentences were for two years or less, 6 were between two and three years, and 9 were over three years. Indeed, since there can have been no new prosecutions since January 29, 1968, and convictions then on appeal have been vacated, it is likely that few if any persons are in federal prisons serving sentences

under these statutes. Thus the impact here of retroactivity would mean only that the civil rights of those past offenders, who are sufficiently interested in the matter to make a motion now asserting their constitutional rights, would be restored, through a proceeding such as that involved in *Lucia*. The retroactive application of *Marchetti* and *Grosso* would not require or invite new trials with the attendant problems of stale evidence and dim memories; instead, it would merely be a matter of vacating and setting aside convictions based on the federal wagering tax statutes.

The inconsequential effect on the administration of justice cause by retroactivity of *Marchetti* and *Grosso* is in sharp contrast to cases where retroactivity has been denied. In *Linkletter*, for example, the Court properly concluded that *Mapp's* retroactive application would have "tax[ed] the administration of justice to the utmost." *Linkletter* v. *Walker*, *supra* at 637. The *Mapp* rule, if retroactive, would have applied to evidence obtained by unreasonable search and seizure in any type of criminal case. Thus, in these cases the States would have been faced with the choice of releasing all prisoners — including murderers, rapists, and any other felons — convicted by such evidence, or retrying these prisoners. Retrials would have had to consider "the excludability of evidence long since destroyed, misplaced or deteriorated." *Linkletter* v. *Walker*, *supra* at 637. *See also Fuller* v. *Alaska*, *supra* at 81 (Regarding evidence seized in violation of § 605 of the Federal Communications Act, 47 U. S.C. § 605). Also, retrials of cases long closed inevitably would be made exceedingly difficult because of "unavailability of witnesses and dim memories." *Stovall* v. *Denno*, *supra* at 300. These and similarly onerous burdens on the administration of justice were very persuasive in convincing the Court to deny retroactivity in *Stovall* v. *Denno*, *supra* at 300 (denying retroactivity to *Wade* and

Gilbert), *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966) (denying retroactivity to *Escobedo* and *Miranda*) and *Tehan* v. *United States*, 382 U.S. 406, 418-19 (1966) (denying retroactivity to *Griffin* v. *California*).

The minimal effect of retroactively applying *Marchetti* and *Grosso* is apparent from a comparison of their impact with the potential impact of the cases mentioned above. This minimal effect on the administration of justice is a persuasive reason in favor of applying *Marchetti* and *Grosso* retroactively.

Even assuming, contrary to the facts, that the retroactivity of *Marchetti* and *Grosso* would disappoint reliance in a relevant way and would place a significant burden on the adminstration of justice, retroactivity would still be justified because of the overriding importance of *Marchetti* and *Grosso's* purpose.

Six new constitutional rules have been applied retroactively even though they disappointed reliance and placed a burden on the administration of justice. These new rules were pronounced in *Griffin* v. *Illinois*,[7] *Gideon* v. *Wainwright*,[8] *Jackson* v. *Denno*,[9] *Bruton* v. *United*

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[7] 351 U.S. 12 (1956). *Griffin* held that a state must furnish trial transcripts to indigents on appeal. This rule has been applied retroactively in *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958). In *Eskridge* the defendant had originally been convicted in 1935.

[8] 372 U.S. 335 (1963). *Gideon* held that counsel must be appointed for indigents in felony cases. The retroactivity of this rule has been established in a host of cases. *E.g.*, *Williams* v. *Alabama*, 341 F.2d 777 (5th Cir. 1965), *United States ex rel. Durocher* v. *LaVallee*, 330 F.2d 303 (2d Cir. 1964).

[9] 378 U.S. 368 (1964). *Jackson* held unconstitutional New York's method of determining the voluntariness of confessions. Lower federal courts have had varying opinions as to *Jackson's* retroactivity. Compare *United States ex rel. Milford* v. *McMann*, 231 F. Supp. 731 (N.D.N.Y.) 1964) (retroactivity doubted). This Court has not directly ruled on the retroactivity of *Jackson* but in *Linkletter*, 381 U.S. at 628-29 n. 13 and in *Roberts* v. *Russell*, 392 U.S. 293, 294 (1968), the Court clearly indicates that *Jackson* does have retroactive effect.

States,[10] *Witherspoon* v. *Illinois*,[11] *and Barber* v. *Page*.[12]

Marchetti and *Grosso* are similar to *Griffin* v. *Illinois*, *Gideon*, *Jackson*, *Bruton*, *Witherspoon* and *Barber* in that the purpose of the new constitutional standards involved is of overriding significance. *Marchetti* and *Grosso* do not merely establish an evidentiary bar as does *Mapp;* they instead establish a complete bar to prosecution.[13] They are designed to prevent the implementation of a statutory scheme whose very definitions of crime are in derogation of the rights guaranteed by the Fifth Amendment. The newly recognized rule goes to the very integrity of the prosecutorial process.

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[10] 391 U.S. 123 (1968). *Bruton* overruled *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), and "held that, despite instructions to the jury to disregard the implicating statements in determining the co-defendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment." *Roberts* v. *Russell*, 392 U.S. 293 (1968). In *Roberts*, the Court held that *Bruton* is to be fully retroactive.

[11] 391 U.S. 510 (1968). *Witherspoon* held that no defendant can be constitutionally put to death on a conviction by a jury from which those with conscientious or religious scruples to the death penalty have been excluded. In a footnote the Court refuses to apply its new rule prospectively only, and clearly indicates that it will be given fully retroactive effect. *Id.* at 523 n. 22.

[12] 390 U.S. 719 (1968). *Barber* held that "the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence." It was held retroactive in *Berger* v. *California*, 393 U.S. 314, 315 (1969).

[13] This is illustrated by the fact that in *Marchetti* the constitutional objection was raised for the first time on a motion to arrest judgment. 390 U.S. at 41-42. *See also* Brief for Petitioner, *Marchetti* v. *United States*, No. 38, O.T. 1966 (renumbered No. 2, O.T. 1967), p. 3. The relief to which this Court held that Marchetti was entitled was available only "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Rule 34, Fed. R. Crim. P.

(2) THE GOVERNMENT HAS CONCEDED THAT PARTIAL RETROACTIVITY IS PROPER IN CRIMINAL CASES — A CONCESSION THAT MILITATES STRONGLY IN FAVOR OF FULL RETROACTIVITY.

Marchetti and *Grosso* have already been given partially retroactive effect; that is, this Court has already ordered application of the principles of *Marcheti* and *Grosso* to cases not yet final on the date of the *Marchetti* and *Grosso* opinions. In a series of per curiam orders, cases that were pending in this Court that involved federal wagering tax convictions were vacated and remanded to the various courts of appeal. *DeCesare* v. *United States,* 390 U.S. 200-05 (1968). The United States has accepted the propriety of partial retroactivity. *See* Brief for Petitioner at 29-31.

The same criteria set forth in *Stovall* for determining full retroactivity are utilized in determining whether a rule should be given partial retroactivity. *See DeStefano* v. *Woods,* 392 U.S. 631 (1968) (per curiam); *Stovall* v. *Denno,* 388 U.S. 293, 300-01 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719, 732 (1966), *United States* v. *Tarrago,* 398 F.2d 621 (2d Cir. 1968) (court finds that *Stovall* test favors partial retroactivity of new insanity standards). Thus in determining that a rule should be given partial retroactivity, a court must be satisfiied that the purpose to be served by the new standards requires at least partial retroactivity; that the extent of reliance by law enforcement authorities on the old standards was not such that partial retroactivity should be denied; and that the effect on the administration of justice of a partially retroactive application of the new standards will not be unduly burdensome. The government is in agreement with this analysis. It argues in *Angelini* that:

> "In *Johnson, Stovall* and *DeStefano* the Court indicated that cases still on direct appeal and those involving collateral proceedings were to be treated identically, insofar as the applicability of the new rule was concerned. Indeed, in *Stovall*, the Court flatly stated that 'no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review' (388 U.S. at 300). Accordingly, the fact that Angelini is attacking the judgment of forfeiture directly, rather than collaterally, is of no consequence."

Brief for Petitioner at 31 & n. 11.

The Court, therefore, by holding *Marchetti* and *Grosso* partially retroactive under the *Stovall* test, has clearly indicated that the purpose of the new standards promulgated therein will be served by retroactive application. The only basis for denying full retroactivity after holding that partial retroactivity was required would be a determination that full retroactivity would be so burdensome on the administration of justice that it should be denied. As we have demonstrated, fully retroactive application of *Marchetti* and *Grosso* would upset only convictions that were obtained in derogation of the defendant's Fifth Amendment rights and would not impose any burden on the administration of justice. The same logic and findings that led the Court to hold *Marchetti* and *Grosso* partially retroactive compel the conclusion that they should be held fully retroactive.

CONCLUSION

For the foregoing reasons, Amicus submits that *Marchetti* and *Grosso* should be held fully retroactive in forfeiture and criminal proceedings. Alternatively, Amicus submits that *Marchetti* and *Grosso* should be held fully

retroactive in criminal proceedings even if held non-retroactive in forfeiture proceedings; or the question of their retroactivity in criminal proceedings should be reserved until directly presented to the Court.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

MARVIN K. COLLIE
HARRY M. REASONER
TRAVIS C. BROESCHE
FRANK F. SMITH, JR.
VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Bldg.
Houston, Texas 77002

Attorneys for Amicus Curiae, Joseph P. Lucia

EXHIBIT A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26316

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. LUCIA,

Defendant-Appellant.

No. 26317

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. LUCIA,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(September 17, 1969)

Before WISDOM and GODBOLD, Circuit Judges, and HUGHES, District Judge

WISDOM, Circuit Judge: This appeal turns upon whether the Supreme Court's decisions in *Marchetti* v. *United States*, 1968, 390 U.S. 39, 88 S.Ct. 687, 19 L.Ed.2d 889, and *Grosso* v. *United States*, 1968, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906, should be applied retroactively. We hold that they should be applied retroactively and reverse the judgment of the district court.

Joseph P. Lucia was indicted in the Southern District of Texas September 18, 1964, on various counts for violation of provisions of the federal statutory scheme for taxing illegal wagers. Lucia first pleaded not guilty to all counts of the indictment, but at his rearraignment January 18, 1965, he changed his plea to guilty to Count 12 of the indictment. That count charged him with attempting to evade the excise tax on wagering (1) by failing to file the required Form 730 (Tax on Wagering Returns), (2) by failing to keep certain records as required by 26 U.S.C. § 4403 and (3) by various acts of concealment, all in violation of 26 U.S.C. § 7201. The court dismissed the remaining counts.

That same day the United States Attorney filed a criminal information charging Lucia and others with conspiring willfully to fail to pay the federal excise tax on gambling, imposed by 26 U.S.C. § 4401, in violation of 18 U.S.C. § 371. The defendant again pleaded guilty. The court sentenced him to consecutive terms of six months on the conspiracy charge and five years on the evasion charge. It also imposed a $10,000 fine on each count. The court suspended the five-year sentence and put Lucia on probation. He has paid the fine and served the remaining six-month sentence.

In January 1968 the Supreme Court decided *Marchetti* and *Grosso*, cases holding that a defendant's assertion of

the privilege against self-incrimination under the Fifth Amendment is a bar to prosecution for violation of the federal laws taxing illegal wagers. Relying on these cases, Lucia filed a motion, in the nature of a writ of error coram nobis, to vacate and set aside judgments and sentences below. Lucia pointed out that although he had completed his sentence, he still remained on probation and was continuing to suffer certain civil disabilities as a result of his conviction. The district court held that *Marchetti* and *Grosso* had not voided the statutes under which Lucia had been convicted, but had merely provided a defense to them; a defense, the court said, that could not be applied retroactively. The court held also that Lucia's guilty plea waived all defenses, including any defense based upon his privilege against self-incrimination. This appeal followed the district court's denial of Lucia's motion.

I.

We disagree with the district court's holding that Lucia waived his self-incrimination defense when he pleaded guilty. The accepted definition of waiver, adopted by the Supreme Court in *Johnson* v. *Zerbst*, 1938, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466, is "an intentional relinquishment or abandonment of a known right or privilege". The courts will not accept an accused's loss of a constitutional right when he does not understand what he is losing. *Miranda* v. *Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 1602; *Boykin* v. *Alabama*, 1969, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; also see Fed. R. Crim. P. 11. In *Boykin* the Court noted that among the "federal constitutional rights . . . involved in a waiver that takes place when a plea of guilty is entered . . . is the privilege against compulsory self-incrimination." The Court pointed out that the "requirement that the prosecution spread on

the record the prerequisites of a valid waiver is no constitutional innovation". As long ago as the decision in *Carnley* v. *Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70, the Supreme Court had held: "Presuming waiver from a silent record is impermissible."

Lucia had no knowledge of his right against self-incrimination under the *Grosso* and *Marchetti* rule for, at the time, those cases had not been decided. In earlier cases, *United States* v. *Kahriger*, 1953, 345 U.S. 22, 73 S.Ct. 510, 98 L.Ed. 754, and *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475, the Supreme Court had rejected the contention that prosecution under the federal gambling tax scheme violates the Fifth Amendment. Lucia, therefore, could not have "knowingly and intentionally" waived his privilege against prosecution: that privilege did not exist. *Johnson* v. *Zerbst* and *Miranda* v. *Arizona* invalidate the waiver of rights that the defendant's own inexperience or ignorance prevent him from knowing. By logical extension, these decisions rule out all the more strongly the waiver of a right, such as Lucia's, that is unknown not because of any infirmity on the defendant's part, but because it is unknowable.

This is a dictate of common sense. Precedent supports it. The Supreme Court has repeatedly held that a party cannot be said to waive a right that was judicially created *after* the supposed waiver. *Curtis Publishing Co.* v. *Butts*, 1967, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, a *civil* suit for libel, was tried before the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, which recognized for the first time certain First Amendment defenses against libel claims. On appeal, the defendant raised a *New York Times* defense, but the court concluded that the right had been waived. The Supreme Court reversed:

> "As our dispositions of Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, and other cases involving constitutional questions indicate, the mere failure to interpose such a defense *prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.* Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at the proper time, [citing case] but an effective waiver must, as was said in Johnson v. Zerbst, be one of a 'known right or privilege'." 388 U.S. at 143, 87 S.Ct. at 1985, 18 L.Ed.2d at 1104. (Emphasis added.)

If Curtis, a defendant in a *civil* case, did not waive an unannounced constitutional defense by his failure to raise it at trial, Lucia, an accused in a *criminal* case, did not waive his constitutional defense.

Grosso compels the same conclusion. The defendant there was charged with failure to pay both the occupational tax on gambling and the excise tax on gambling proceeds. At trial *Grosso* raised constitutional objections to the occupational-tax counts, but not to the excise-tax counts. The Supreme Court reversed, nonetheless, on *all* counts:

> "Given the decisions of this Court in Kahriger and Lewis, supra, which were on the books at the time of petitioner's trial, and left untouched by Albertson v. SACB, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." 390 U.S. at 71, 88 S.Ct. at 715, 19 L.Ed.2d at 913-914.

The United States contends that even if the waiver must be knowing, and if waiver of specific defenses at trial assumes knowledge of their existence, there is something special about a guilty plea that makes the possible defenses irretrievable: "a plea of guilty waives all defenses and

procedural defects which are not jurisdictional". That statement is true only when the defendant is able to assess the various defenses available to him, as well as the consequences of submitting to conviction. Otherwise, the requirements integral to accepting guilty pleas make no sense. See Fed.R.Crim. P. 11; *McCarthy* v. *United States*, 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418; *Von Moltke* v. *Gilles*, 1947, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309. A plea of guilty is an abbreviated way of going down the list of possible defenses and privileges — right to counsel, jury trial, confrontation of witnesses, self-incrimination, etc. — and waiving each one.[1] The plea represents the relinquishment of a bundle of defenses, and has no magical implications with regard to finality beyond that. The whole does no exceed the sum of its parts. If one of the component waivers was ineffective because of the inadequate knowledge upon which it was made, the defect is not cured by virtue of the fact that the waiver was made implicitly, as part of a guilty plea.

In *Haynes* v. *United States*, 1968, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923, the Supreme Court upheld the privilege against self-incrimination as a valid defense to prosecution under the National Firearms Act, under a rationale similar to that in *Marchetti*. Haynes had pleaded guilty.

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[1] See United States ex rel. Rogers v. Warden of Attica State Prison, 2 Cir. 1967, 381 F.2d 209, 213:

> "[W]e must be wary of blindly applying . . . [the guilty plea waiver] doctrine to every case involving such a plea. There is nothing inherent in the nature of plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures . . ."

The Supreme Court in a footnote pointed out the absence of waiver: "Petitioner's plea of guilty did not, of course, waive his previous claim of constitutional privilege." 390 U.S. at 87, 88 S.Ct. at 725, 19 L.Ed.2d at 926.

Several post-*Marchetti* and *Grosso* decisions have rejected arguments that failure to assert the constitutional defense guaranteed by the Fifth Amendment, constituted a waiver of the defendant's constitutional rights. In *United States* v. *Manfredonia*, 2 Cir. 1968, 391 F.2d 229, the court said:

> "Since in *Marchetti* the privilege had been asserted at the trial, the government argues here that the appellants' failure to assert the privilege against self-incrimination as a defense at trial amounted to a waiver of protection . . . At the time of the trial of these appellants the wagering statutes were valid and the decisions in Lewis v. United States, 1955, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475 and United States v. Kahriger, 1952, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 were still applicable. There is no reason to suspect that appellants knowingly waived their Fifth Amendment privilege at trial. These defendants should not be required to anticipate the Supreme Court action overruling Lewis and Kahriger or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overriding decision. We believe the effect of the Supreme Court decisions in *Machetti* and *Grosso* is to prevent enforcement of the wagering statutes as they are now designed because of the 'substantiality of the risks of incrimination.'" 391 F.2d at 230.

Accord: *Harris* v. *United States*, 8 Cir. 1968, 390 F.2d 616; *United States* v. *Lookretis*, 7 Cir. 1968, 398 F.2d 64. See also *United States* v. *Butler*, 5 Cir. Nos. 22,274 and 23,055, aff'd 361 F.2d 266; vacated and remanded for further consideration in light of *Marchetti* and *Grosso;*

De Cesare v. *United States*, 1968, 390 U.S. 200, 88 S.Ct. 900, 19 L.Ed.2d 1026. Although these cases were all direct appeals from judgments which had not become final, the rationale on which they rest is applicable to the case before the Court.

We conclude that Lucia's failure to raise the self-incrimination defense in the trial court and his plea of guilty did not prevent his raising the point in the present action. *See United States* v. *Miller*, 4 Cir. 1969, 406 F.2d 1100.

II.

The test for deciding the retroactivity of new constitutional standards of criminal procedure has been progressively developed in a recent line of Supreme Court decision.[2] *Linkletter* v. *Walker*, 1965, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601; *Tehan* v. *Shott*, 1966, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453; *Johnson* v. *New Jersey*, 1966, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882; *Stovall* v. *Denno*, 1967, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; *Desist* v. *United States*, 1968, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248. *Stovall* sets out the formula to be applied in each case:

> "The criteria guiding resolution of the questions implicate (a) the purpose to be served by the new stand-

[2] Commentators have been active in this area. See Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 U. Va. L. Rev. 201 (1965); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 U. Va. L. Rev. 1115 (1964); Mishkin, The Supreme Court, 1964 Term Foreward: The High Court, the Great Writ and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Schaeffer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631 (1967); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

ards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297, 87 S.Ct. at 1970, 18 L.Ed.2d at 1203.

"Foremost among these factors is the purpose to be served by the new court rule." *Desist* v. *United States,* 394 U.S. at 249. As the Court pointed out in *Desist* "it was principally the Court's assessment of the purpose of *Mapp* v. *Ohio,* 1961, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the states," 394 U.S. at 249. The exclusionary rule is "based on the necessity for an effective deterrent to illegal police action". When the court has made its rulings prospective only, it has done so on the rationale that the damage caused by the improper governmental behavior will not be undone or repaired by reversing existing convictions. Thus in *Linkletter,* the defendant's privacy had already been breached by an illegal search. In *Mapp* v. *Ohio,* the fruits of such searches were held inadmissible at trial. The deterrent purpose of the *Mapp* rule would not "be advanced by making the rule retrospective. The misconduct of the police has already occurred and will not be corrected by releasing the prisoners involved". *Linkletter,* 381 U.S. at 637.

In contrast, new constitutional rules going to the fundamental fairness of a trial, the accuracy and reliability of the fact-finding process, rules that substantially reduce the likelihood that an innocent person will be convicted, have received retroactive application. For example, in *Bruton* v. *United States,* 1968, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, overturning *Delli Paoli* v. *United States,* 1957, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, the court held that the admission of a defendant's extra-judicial confes-

sion implicating a co-defendant violates the co-defendant's right to confront his accuser under the Sixth Amendment. In *Roberts* v. *Russell*, 1968, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100, 1103, the Court held that "[this] constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." The purpose of the new *Bruton* rule, greater accuracy in guilt-determination, applied to past as well as future trials, and the Court therefore extended *Bruton* retroactively.

There is no doubt that at the time of Lucia's arrest, indictment, and trial, the prosecution relied on the state of the law as represented by *United States* v. *Kahriger* and *Lewis* v. *United States*. The *Stovall* factor of reliance therefore weighs against retroactive application of the *Marchetti-Grosso* rule. We feel, however, that we should give greater weight to the purpose of *Marchetti* and *Grosso*[3] than to the factor of reliance. The purpose of the *Marchetti-Grosso* rule is to protect the constitutional privilege against a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process. It does not involve guilt or innocence. Indeed, "the constitutional privilege was intended to shield the guilty and the imprudent as well as the innocent and foresighted . . ." *Marchetti* 390 U.S. at 51. The Supreme Court concluded that the objective of the statute — to force disclosure by punishing silence — was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions. Stated in terms of balancing *Stovall* factors, we consider the preservation of the Fifth Amendment privilege against self-incrimination more important than the fact that the government re-

[3] See Desist v. United States, 1969, 394 U.S. 244, 249n.14, 89 S.Ct. 1030, 22 L.Ed.2d 248.

lied on earlier — now overruled — decisions. We disagree, therefore, with the conclusions the Sixth Circuit reached in *Graham* v. *United States,* 6 Cir. 1969, 407 F.2d 1313.

The third *Stovall* factor is the extent of the burden on the administration of justice that would result from retroactivity. The number of offenders presently in jail under the federal gambling tax laws must be small indeed. The government acknowledged in its brief that no one had been prosecuted under the wagering laws since the Supreme Court decided *Marchetti* and *Grosso.* According to the brief, 17 persons of the 1262 convicted under these laws in 1965 and 1966 received prison terms longer than one year. We do not have to fear a wholesale emptying of the jails. Nor will the courts and United States Attorneys be taxed with retrying old offenses on the basis of stale evidence. In short, the practical effects of retroactivity in this case will be minimal.

Marchetti and *Grosso* rest upon the constitutional principle that a man's dignity is violated when he is forced into the dilemma of either speaking against himself or suffering criminal sanctions. Lucia's dignity has already been violated, since the government has long since indicted, tried, and punished him. In that sense the harm to him cannot be repaired, and he stands in *Linkletter's* position. Unlike *Linkletter,* however, he stands convicted of no act that the government now can legitimately punish.

The judgment of the district court is REVERSED and the cause is REMANDED for disposition consistent with this opinion.

No. 5

FILED
OCT 12 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $9,674.00,

DONALD J. ANGELINI,

Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF ON BEHALF OF CLAIMANT-RESPONDENT

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Claimant-Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60610 (312) 525-0561

In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 5

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00,

DONALD J. ANGELINI,

Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF CLAIMANT-RESPONDENT

This supplemental brief is filed pursuant to the provisions of Rule 41(5) of the Supreme Court Rules, as amended, 1970.

The purpose of this supplemental brief is twofold: *First*: To distinguish *Helvering* v. *Mitchell*, 303 U.S. 391, a case

given but passing recognition by the government in its Brief but relied upon almost exclusively in oral argument had before this Court on February 25-26, 1969, and, therefore, not briefed by the respondent in the context orally argued by the petitioner; and, *Second*: To submit later authorities since those dates of initial argument and the present.

SUMMARY OF ARGUMENT

A. *Helvering* v. *Mitchell,* 303 U.S. 391, does not apply because the instant forfeiture is a pure penalty for invoking the privilege of self-incrimination. Penalty is not restricted to fine or imprisonment.

B. *United States* v. *One 1965 Buick*, 392 F. 2d 672 errs in its conclusion that the privilege against self-incrimination is a mere "exclusionary" rule of evidence. The interrelation between the payment and registration would compel self-incrimination in either case.

C. The instant case is particularly appropriate to retrospective application.

ARGUMENT

A.

HELVERING v. MITCHELL, 303 U.S. 391 DOES NOT APPLY BECAUSE THE INSTANT FORFEITURE IS A PURE PENALTY FOR INVOKING THE PRIVILEGE OF SELF-INCRIMINATION. PENALTY IS NOT RESTRICTED TO FINE OR IMPRISONMENT.

On the original argument, though mentioned only fleetingly in its Brief, the Government relied strongly upon *Helvering* v. *Mitchell,* 303 U.S. 391. The initial distinction there exists in that being (1) an argument resisting the imposition of the fifty percent penalty on taxes fraudulently evaded as placing a person twice in jeopardy, an issue not present here and (2) the conclusion of the Court that the fifty percent penalty to be assessed together with the tax owed was purely remedial, and proper to the effort expended in determining the tax fraudulently evaded. 303 U.S. at 401.

> "2. The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

There can be no contention here similar to the *Helvering* rationale. This is not a tax, nor a compensating penalty,[1]

[1] The government has conceded in one case that delinquency penalties will not be assessed as to the taxes imposed under Title 26 U.S.C. 4401 and 4411 because the failure to pay the taxes was based on reasonable cause. *Mersel* v. *United States,* 5 Cir., 420 F.2d 517, 521.

specifically excluded from the operation of *Marchetti* and *Grosso*, 390 U.S. at 60.

The alleged gambling activities of Mr. Angelini for the period involved have separately been assessed, together with attendant penalties, and *paid*. This forfeiture is a pure penalty imposed as a result of illegal conduct, having no relation to compensation.

All of the cases on which the Government relies are totally inappropriate to the contentions here. It must be remembered that the only act which would make this property subject to forfeiture is the refusal of its owner to waive his Fifth Amendment rights. Carrying $8,764.00 is not an act warranting forfeiture. Using $8,674.00 in gambling enterprises is not an act warranting forfeiture. The only act the Government contends warrants this forfeiture is a failure to waive Fifth Amendment rights. The early case of *Boyd* v. *United States,* 116 U.S. 616 noted the difference.

> "But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property." *Boyd* v. *United States,* 116 U.S. 616, 624.

There is no question that if the claimant here had waived his Fifth Amendment rights and registered under Section 4412 this money could not be forfeited.

Similar in import, and by inverse reasoning identical, is the case of *Lees* v. *United States*, 150 U.S. 476. In that forfeiture action seeking to impose a penalty for bringing aliens into the United States contrary to law, the defendant was called on as a witness by the Government. This Court held that in such a case a defendant could not be compelled to be a witness against himself, and the case was sent back for retrial without his testimony. Here the forfeiture is sought because the defendant elected not to be a witness against himself.

This case can only be equated with *Garrity* v. *State of New Jersey*, 385 U.S. 493, where the police officers were given the choice of incriminating themselves or forfeiting their jobs. Here the choice was incriminate yourself or forfeit your money. That this respondent elected not to incriminate himself does not carry with it the correlative that his money is forfeit. This Court has emphasized that the choice to speak in the unfettered exercise of one's own free will and to suffer no "penalty" for silence, as enunciated by it in *Malloy* v. *Hogan*, 378 U.S. 1, does not restrict "penalty" to fine or imprisonment. *Spevack* v. *Klein*, 385 U.S. 511, 515.

B.

UNITED STATES v. ONE 1965 BUICK, 392 F. 2d 672, ERRS IN ITS CONCLUSION THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS A MERE "EXCLUSIONARY" RULE OF EVIDENCE. THE INTERRELATION WOULD COMPEL SELF-INCRIMINATION IN EITHER CASE.

Certiorari was granted in this cause because of a seeming conflict between this case and *United States* v. *One 1965*

Buick, 6 Cir., 392 F. 2d 672. The essence of that decision is found at page 676 where the Court said:

> "The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax." *United States* v. *One 1965 Buick,* 6 Cir., 392 F. 2d 672, 676.

We respectfully disagree that the exercise of the privilege against self-incrimination constitutes a mere "exclusionary rule of evidence". Illustratively, if an agent testified that he questioned a defendant, and the defendant refused to answer, that is evidence that is excluded under the exclusionary rule. See *Tehan* v. *United States,* 382 U.S. 406. Here we have a case where only proof of a person adhering to his Fifth Amendment privilege constitutes proof of the crime that makes the respondent moneys subject to forfeiture. That is an attack on a fundamental right safeguarded by the Fifth Amendment. See *Gideon* v. *Wainwright,* 372 U.S. 335.

The Sixth Circuit continues its reasoning in arriving at the conflicting decision:

> There can be no question but that Congress has power to tax unlafwul activities. The fact that a business is unlawful does not exempt it from payment of taxes. United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

That Court's reliance upon this Court's decision in *United States* v. *Sullivan,* 274 U.S. 259 is inapposite. In an income tax return required by virtually every citizen to file, a person invoking his privilege against self-incrimination as to his occupation allows an effective exercise of that constitutional right. Whereas here, filing of the return exclusive to a certain class points unerringly and directly to a specific type of occupation even if the privilege were invoked as to every question.

The decision in that case seems to overlook the recognition in *Marchetti* and *Grosso* that

> "The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure; Form 11-C thus constitutes both the application for registration and the return for the occupational tax." *Marchetti* v. *United States,* 390 U.S. 39, 42-43.

Since the interrelation of the payment and the registration are clearly recognized, and the taxes cannot be paid without the concomitant abandonment of Fifth Amendment rights, there can be no "willful failure" to pay taxes or make a return so as to make the articles and things forfeit under Title 26 U.S.C. 7203.[2]

Further, the Sixth Circuit, in rejecting the Seventh Circuit decision in this case, concluded with a kind of catch-all that

> "In any event, the property forfeited was found to be contraband and appellants are not entitled to have it returned to them." 39 F.2d at 784.

This overlooks the distinction this Court made in *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, between "derivative contraband" and "per se contraband". Obviously the respondent here is within the former classification. Equally obviously it must derive criminality from a criminal act.

We think the Sixth Circuit's and the Government's insistence that the distinction from *Marchetti* and *Grosso* exist in criminal prosecutions versus civil cases overlook the Constitutional claim here bottomed on the Fifth Amendment.

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[2] We experience some practical difficulty in perceiving how three Buicks and three adding machines were intended for use in failing to file a return or pay taxes. 392 F.2d at 697 and Title 26 U.S.C. 7302.

In trying to impress this Court that different standards apply, the Government lists the differences at page 15 of its brief, such as the power of the court to direct the verdict in favor of the Government, the lesser burden of proof, the want of right of confrontation, the availability of appeal to the Government, etc., would have seemed to have been effectively answered many years ago by this Court in *United States* v. *Regan,* 232 U.S. 494. In that case, holding that proof beyond reasonable doubt, was not necessary in forfeiture proceedings differentiated the Government's claimed distinctions from the posture of this case when it said:

> "The cases of Boyd v. United States, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and Lees v. United States, 150 U.S. 476, 37 L. ed 1150, 14 Sup. Ct. Rep. 163, are without present application for they deal with the guaranty in the 5th Amendment to the Constitution against compulsory self-incrimination, which, as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions, and is of broader scope than are the guaranties in article 3 and the 6th Amendment governing trials in criminal prosecutions." *United States* v. *Regan,* 232 U.S. 494, 499.

The Government's profferred distinctions emphasizing the absence of 6th Amendment rights, and the double jeopardy right of the 5th Amendment, have been over and over again distinguished from the pervasiveness of the 5th Amendment privilege against self-incrimination. In *Counselman* v. *Hitchcock,* 142 U.S. 547, this Court emphasized that the 6th Amendment was much narrower in scope and concept than the 5th. (142 U.S. at 563)

In approving the use of depositions in a forfeiture proceeding, this Court in *United States* v. *Zucker,* 161 U.S. 475, again emphasized no provisions under the 4th and the incrimination provision of the 5th Amendment were affected.

Again in *Hebner* v. *United States,* 213 U.S. 103, this Court reiterated that the pervasive rights under the Fourth and incriminating provisions of the Fifth are unaffected by the fact that, in a penalty or forfeiture proceeding, there can be a direction of the verdict in favor of the government.

As this Court said in *Hitchcock,*

> "It is quite clear that legislation cannot abridge a constitutional privilege. . . ." (142 U.S. at 585)

C.

THE INSTANT CASE IS PARTICULARLY APPROPRIATE TO RETROSPECTIVE APPLICATION

The purpose to be served by the "new" standards is a reiteration of the basic concept of American jurisprudence that none shall be penalized for exercise of a Constitutional right. This Court had no hesitancy in granting retroactive application in a recent civil case where first Amendment rights were involved. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130.

The extent of reliance by law enforcement officials and the effect on the administration of justice would seem to apply only when the "old" standard is firmly entrenched.

Due regard for contravailing considerations — reliance on the old standard of *Kahriger* and *Lewis* and the impact of retroactivity upon the administration of justice does not counsel against retroactivity of *Marchetti* and *Grosso.* Borrowing from this Court's language in *Roberts* v. *Russell,* 392 U.S. 293, the element of reliance is not persuasive, for *Kahriger* and *Lewis* have been under attack from their inception, and many courts, while feeling bound by this Court's decision in those cases, consistently urged reconsideration.

Further, it seems that this Court has already directed the application of *Marchetti* and *Grosso* to this case when it vacated the judgment of the Court of Appeals and remanded it to that Court for further consideration in the light of its decision, which procedure seems the proper one where retroactivity or limited retroactivity are to be employed. See *Desist* v. *United States*, 394 U.S. 244, 259, Justice Harland dissenting.

Additional authorities following the decision of the Seventh Circuit, some expressly rejecting the Sixth, are *United States* v. *One Philco Television*, S.D.Tex., 292 F. Supp. 35; *Silbert* v. *United States*, D.Md. 289 F. Supp. 318; *United States* v. *$3,296.00 in Currency*, N.D. N.Y., 286 F. Supp. 543; *United States* v. *$125,882.00 in Currency*, S.D.N.Y., 286 F. Supp. 643; and *United States* v. *One 1967 Buick Electra*, 225, D.N.J., 289 F. Supp. 642.

Other authorities relied on by United States

We request the Court to observe some cases mentioned by the Government:

1. *Kimm* v. *Rosenberg*, 363 U.S. 405, was "a five to four decision the other way and accurately reflected the pre-*Malloy* v. *Hogan* construction of the Fifth Amendment." *Spevack* v. *Klein*, 385 U.S. 511, 514, footnote 2.

2. *Kaufman* v. *Hurwitz*, 4 Cir., 176 F. 2d 210 is a case involving a refusal to answer by a person seeking a discharge in bankruptcy, questions asked at the first meeting of creditors. Of course, that aspect of bankruptcy has fulfilled the coextensive immunity that this Court invited the Congress to make in respect of the wagering statute. See Title 11, U.S.C., §25(a)(10) providing that "no testimony given by him shall be offered in evidence against him in any criminal proceeding, . . . "

3. The many citations regarding innocent owners is not available here. In *Boyd*, the Supreme Court shrugged off such a contention in circumstances such as this.

> "In *U. S.* v. *Mason*, Judge Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' "
>
> *Boyd* v. *United States*, 116 U.S. 616, 637.

4. The Government is in error when it says that this Court applied *Cipriano* v. *City of Houma*, 395 U.S. 701, in a "wholly prospective fashion." On the contrary, limited retroactivity was applied in that case.

> "Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challeneging the election and which are not yet final." *Cipriano* v. *City of Houma*, 395 U.S. 701, 706.

Respondent respectfully reminds this Court that Donald J. Angelini, the owner of the coin and currency involved herein, is not an "accidental beneficiary" of *Marchetti* and

Grosso. Mr. Angelini raised the invalidity of Sections 4411 and 4412 of Title 26, U.S.C., as far back as 1965 in cause entitled *United States of America* v. *Donald J. Angelini,* 7 Cir., 346 F. 2d 278, where he was convicted of a failure to file said returns, served his sentence, and paid his fine. He urged the invalidity of these sections in the United States Court of Appeals for the Seventh Circuit and in this Court under cause entitled *Angelini* v. *United States,* 382 U.S. 832. This Court denied certiorari. Thus Donald J. Angelini has protested prior violation of his Fifth Amendment rights consistently and continues so to do before this Court in this action.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Claimant-Respondent

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* UNITED STATES COIN & CURRENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 5. Argued February 25–26, 1969—Reargued October 20, 1970—Decided April 5, 1971

The United States brought this action for the forfeiture of money in the possession of one Angelini when he was arrested for failing to register as a gambler and to pay the gambling tax required by 26 U. S. C. §§ 4411, 4412, and 4901. Having found that the money had been used in violation of those laws, the District Court ordered forfeiture under 26 U. S. C. § 7302. After the Court of Appeals affirmed, the case was remanded for further consideration in the light of this Court's subsequent decisions in *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, which held that gamblers had the Fifth Amendment right to remain silent despite the statutory requirement that they submit reports which could incriminate them. The Court of Appeals thereafter ordered the money's return, having concluded that Angelini could assert his Fifth Amendment privilege. The Government contends that (1) the *Marchetti-Grosso* rationale is inapplicable to § 7302 forfeiture proceedings because under that provision "any property intended for use in violating the . . . internal revenue laws" is subject to forfeiture regardless of the property owner's guilt, and (2) *Marchetti* and *Grosso* should not be given retroactive effect. *Held:*

1. The Fifth Amendment privilege may properly be invoked in this case since the forfeiture statutes, when viewed in their entirety, are intended to penalize only persons significantly involved in a criminal enterprise. Pp. 2–7.

2. The *Marchetti-Grosso* rule has retroactive effect in a forfeiture proceeding under § 7302. Pp. 7–9.

393 F. 2d 499, affirmed.

Syllabus

HARLAN, J., delivered the opinion of the Court, in which BLACK, DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BLACK, J., filed a concurring statement. BRENNAN, J., filed a concurring opinion. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1970

United States, Petitioner, v. United States Coin and Currency, Etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

After Donald J. Angelini had been convicted for failing to register as a gambler and to pay the related gambling tax required by federal law, 26 U. S. C. §§ 4411, 4412, 4901, the United States instituted these forfeiture proceedings to obtain $8,674 which Angelini had in his possession at the time of his arrest. The District Court for the Northern District of Illinois found that the money was being used in a bookmaking operation in violation of these internal revenue laws and ordered forfeiture under 26 U. S. C. § 7302 which provides:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws . . . and no property rights shall exist in any such property. . . ."

When the Court of Appeals affirmed, we granted certiorari, 390 U. S. 204, and remanded the case for further consideration in the light of our decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), which precluded the criminal conviction of gamblers who properly assert their privilege against self-incrimination as a ground for their failure to comply with these aspects

of the gambling tax law. A unanimous panel of the Court of Appeals concluded that Angelini may properly assert his Fifth Amendment privilege in this forfeiture proceeding and ordered the return of the seized money. 393 F. 2d 499 (1968). Since the Court of Appeals for the Sixth Circuit subsequently came to the opposite conclusion,[1] we granted the Government's petition for certiorari in the present case, 393 U. S. 949 (1968), in order to resolve the conflict. The case was first argued at the 1968 Term and re-argued at the current Term. We now affirm the decision below.

I

The Government's principal argument turns upon an exceedingly narrow construction of our decisions in *Marchetti* and *Grosso*. In those cases, we took pains to make it clear that the Court in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities. It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question. The statute commanded that gamblers submit special registration statements and tax returns that contained information which could well incriminate them in many circumstances. Because the risk of self-incrimination was substantial, we held that a Fifth Amendment privilege could be raised as a defense to a criminal prosecution charging failure to file the required forms. Since it was only this method of tax collection which was subject to constitutional objection, we indicated that the Government remained free to collect taxes due under the statute so long as it did not attempt to punish the taxpayer for his failure to file the required documents.

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[1] *United States* v. *One 1965 Buick*, 392 F. 2d 672, rehearing denied, 397 F. 2d 782 (CA6 1968).

The Government now relies heavily on the fact that *Marchetti* and *Grosso* only held that "a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax." (Emphasis supplied.)[2] It argues that just as it may collect taxes in a civil action, the Government may also initiate forfeiture proceedings—which are also formally civil in nature—without offending *Marchetti* and *Grosso*. But as *Boyd* v. *United States*, 116 U. S. 616, 634 (1886), makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offenses committed by him*, though they may be civil in form are in their nature criminal" for Fifth Amendment purposes. (Emphasis supplied.) From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force. See also *One 1958 Plymouth Sedan* v. *United States*, 380 U. S. 693, 700 (1965).

The Government does not seriously contend otherwise. Instead it places great emphasis on the peculiar nature of the proceedings authorized under § 7302. *Boyd*, we are told, was only concerned with forfeitures which are imposed "by reason of offenses committed by" the owner. 116 U. S., at 634. In the present action, however, the Government contends that the guilt of the owner of the money is irrelevant. The forfeiture statute, it is noted, simply authorizes confiscation of "any property intended for use in violating the provisions of the internal revenue laws"; it does not require that Angelini

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[2] *Grosso* v. *United States*, 390 U. S., at 60–70, n. 7; see also *Marchetti* v. *United States*, 390 U. S., at 41–42, 61.

be the one who possessed the requisite intention. If, for example, Angelini had left the money in a bookmaker's office without having any reason to know that illegal activities would take place there, the Government reads the statute as permitting confiscation if it can be shown that the *bookmaker* used Angelini's money in illegal wagering acivities. Since, under the Government's view, the guilt or innocence of the actual owner of the money is irrelevant in an action under § 7302, the Government urges that the present forfeiture should not be considered the result of a "criminal" proceeding for Fifth Amendment purposes.

If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the propery shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different meaning. Cf. *Morissette* v. *United States*, 342 U. S. 246 (1952). However, as our past decisions have recognized, centuries of history support the Government's claim that forfeiture statutes similar to this one have an extraordinarily broad scope. See *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505 (1921); *United States* v. *One Ford Coupe*, 272 U. S. 321 (1926). Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. See *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399–401 (1878); *The Palmyra*, 12 Wheat. 1, 14 (1827). Simply put, the theory has been that if the object is "guilty," it should be held forfeit. In the words of a medieval English writer, "Where a man killeth another with the sword of John of Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." [3] The modern forfeiture

[3] Quoted from Holmes, The Common Law, at 23 (Howe ed. 1963).

statutes are the direct descendants of this heritage, which is searchingly considered by Mr. Justice Holmes in a brilliant chapter in his book, The Common Law.[4] The forfeiture action in the present case was instituted as an *in rem* proceeding in which the money itself is the formal respondent. More remarkable, the Government's complaint charges the *money* with the commission of an actionable wrong.[5]

It would appear then that history does support the Government's contention regarding the operation of this forfeiture statute, as do several decisions rendered by the courts of appeals.[6] But before the Government's attempt to distinguish the *Boyd* case could even begin to convince, we would have first to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a "super-

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[4] Holmes, *supra*, n. 3, c. 1.

[5] The libel charged that "On one or more of the aforementioned dates . . . aforesaid respondents [*i. e.*, the money] had been used and were intended to be used in violation of the Internal Revenue Laws of the United States of America. . . . WHEREFORE, FRANK E. McDONALD, United States Attorney for the Northern District of Illinois . . . prays . . . That aforesaid respondents be adjudged and decreed forfeited to the UNITED STATES OF AMERICA." App., at 5–6.

[6] *United States* v. *Bride*, 308 F. 2d 470 (CA9 1962); *United States* v. *One 1958 Pontiac Coupe*, 298 F. 2d 421 (CA7 1962); cf. *United States* v. *One 1957 Oldsmobile Automobile*, 256 F. 2d 931 (CA5 1958).

stitution" inherited from the "blind days" of feudalism.[7] And this Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment. See, *e. g.*, *Goldsmith-Grant Co.* v. *United States*, *supra*. Cf. *United States* v. *One Ford Coach*, 307 U. S. 219, 236–237 (1939).

We need not pursue that inquiry once again, however, because we think that the Government's argument fails on another score. For the broad language of § 7302 cannot be understood without considering the terms of the other statutes which regulate forfeiture proceedings. An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law. . . ." 19 U. S. C. § 1618.[8] Upon this showing, the Secretary is authorized to return the seized property "upon such terms and conditions as he deems reasonable and just." It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner's protests have gone unheeded. *United States* v. *Edwards*, 368 F. 2d 722 (CA4 1966); *Cotonoficio Bustese S. A.* v. *Morgenthau*, — App. D. C. —, 121 F. 2d 884 (1941) (Mr. Justice Rutledge). When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enter-

[7] 1 Blackstone, Commentaries, c. 8, at 290 (1765).

[8] Although this statute appears in Title 19, regulating forfeitures under the customs laws, 26 U. S. C. § 7327 provides that: "The provisions of law applicable to the remission or mitigation by the Secretary or his delegate of forfeitures under the customs laws shall apply to forfeitures incurred or alleged to have been incurred under the internal revenue laws."

prise.[9] It follows from *Boyd*, *Marchetti*, and *Grosso* that the Fifth Amendment's privilege may properly be invoked in these proceedings.[10]

II

The Government next contends that in any event our decisions in *Marchetti* and *Grosso* should not be retroactively applied to govern seizures of property taking place before these decisions were handed down on January 29, 1968. It is said that in reliance on the Court's earlier decisions in *Kahriger* and *Lewis*,[11] which upheld the validity of the gambling tax and registration requirements, "$6,686,098.22 worth of money and property has

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[9] It is noteworthy that the libel instituted by the United States made claim to the $8,674 because "a business was being *operated by Donald Angelini* in violation of [the gambling tax provisions]," App., at 5 (emphasis supplied), and that the evidence introduced at trial was consistent only with this theory of liability.

[10] In the present case, the Government has not suggested that the Fifth Amendment provides Angelini with a defense only with respect to his failure *to file* the required registration and tax forms, and that the gambler's failure *to pay* the required tax may still be punished consistently with *Marchetti* and *Grosso*. This argument was properly abandoned by the Solicitor General on reargument in *Marchetti* and *Grosso*, see Brief for the United States on Reargument, at 37–41, *Marchetti* v. *United States* and *Grosso* v. *United States*, *supra*, and we held in *Grosso* that "Although failures to pay the excise tax and to file a return are separately punishable under 26 U. S. C. § 7203, the two obligations must be considered inseparable for purposes of measuring the hazards of self-incrimination which might stem from payment of the excise tax." 390 U. S., at 65. Similarly, *Marchetti* ruled that "The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure." 390 U. S., at 42–43, and see n. 3. Consequently, it appears clear that the Fifth Amendment provides gamblers in Angelini's position with a complete defense in the present action.

[11] *United States* v. *Kahriger*, 345 U. S. 22 (1953); *Lewis* v. *United States*, 348 U. S. 419 (1955).

been seized under 26 U. S. C. 7302." Government's Brief, at 32–33. The Solicitor General concedes, however, that this figure overestimates the Government's stake in the retroactivity question since "there are no reliable statistics indicating what percentage [of the property seized] was eventually returned to claimants" who proved to the Secretary of the Treasury that they were not significantly involved in criminal gambling activities. Government's Brief, at 33. Nevertheless, the Government contends that simply because some litigation may be anticipated as gamblers attempt to reclaim their property, the retroactive effect of the new rule should be limited.

We cannot agree. Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial. *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *Shott*, 382 U. S. 406 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293 (1967). Rather *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance. These cases held that gamblers in Angelini's position had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them. In the absence of a waiver of that right, such persons could not properly be prosecuted at all.

Given the aim of the *Marchetti-Grosso* rule, it seems clear that the Government must be required to undergo the relatively insignificant inconvenience involved in defending any lawsuits that may be anticipated. Indeed, this conclusion follows *a fortiori* from those decisions mandating the retroactive application of those new rules which substantially improve the accuracy of the

factfinding process at trial.[12] In those cases, retroactivity was held required because the failure to employ such rules at trial meant there was a significant chance that innocent men had been wrongfully punished in the past. In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity.[13]

Affirmed.

MR. JUSTICE BLACK concurs in the Court's judgment and the opinion so far as it goes. He would go further and now overrule *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and its progeny.

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[12] See, *e. g.*, *Roberts* v. *Russell*, 392 U. S. 293 (1968); *McConnell* v. *Rhay*, 393 U. S. 2 (1968); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968); *Berger* v. *California*, 393 U. S. 314 (1969).

[13] In the view of the writer of this opinion, the fact that this case had not become final by the time of this Court's decisions in *Marchetti* and *Grosso* suffices, without more, to require rejection of the Government's contention respecting nonretroactivity. See, *e. g.*, *Desist* v. *United States*, 394 U. S. 244, 256 (dissenting opinion of HARLAN, J.), and *Williams* v. *United States* (and companion cases), — U. S. —, — (1971) (concurring and dissenting opinion of HARLAN, J.).

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1970

United States, Petitioner, *v.* United States Coin and Currency, Etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Brennan, concurring.

I join the opinion of the Court. The dissent would have us hold that the Government may continue indefinitely to enforce criminal penalties against individuals who had the temerity to engage in conduct protected by the Bill of Rights before the day that this Court held the conduct protected. Any such holding would have no more support in reason than it does in our cases.

I

Frank recognition of the possible impact of retroactive application of constitutional decisions on the administration of criminal justice has led this Court to establish guidelines to determine the retroactivity of "constitutional rules of criminal procedure." *Stovall* v *Denno*, 388 U. S. 293, 296 (1967). Since "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice," the "retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson* v. *New Jersey*, 384 U. S. 719, 728 (1966). But although "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities,' "

Stovall v. *Denno*, 388 U. S., at 298, quoting *Johnson* v. *New Jersey*, 384 U. S., at 729, as a general matter "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." *Williams* v. *United States*, *ante*, at ——. "Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Ibid.**

The reasoning that underlies these guidelines is clear. The States and the Federal Government have, of course, a legitimate interest in the evenhanded enforcement of such sanctions as they desire to impose upon any conduct that they may constitutionally prohibit. By definition a "new rule of criminal procedure" casts no doubt upon the power of government to punish certain conduct, but only upon the legitimacy of the process by which persons were found to have engaged in that conduct. Of course a government has no legitimate interest in upholding an unconstitutional system of criminal procedure. But accepting the results that an unconstitutional procedure has reached in the past does not uphold such a system for the future. Notwithstanding the new procedural rule the government retains a legitimate interest in sanctioning conduct which it may constitu-

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*The few cases in which we have recognized that a new constitutional rule may in some circumstances improve the accuracy of the factfinding process, while at the same time denying retroactive application to that rule, do not in my view undercut the force of these statements. The relevant cases are collected and discussed in an Appendix to this opinion, *infra*, pp. ———

tionally prohibit. Accordingly, when a new procedural rule has cast no substantial doubt upon the reliability of determinations of guilt in criminal cases, we have denied the rule retroactive effect where a contrary decision would "impose a substantial burden [of retrials] upon the . . . judicial system . . . while serving neither to redress knowing violations of [constitutional rights] nor to protect a class of persons the government has no legitimate interest in punishing." *Williams* v. *United States, ante,* at —— (BRENNAN, J., concurring); see *Desist* v. *United States,* 394 U. S. 244 (1969). But since the government has no legitimate interest in punishing those innocent of wrongdoing, cf. *Thompson* v. *Louisville,* 362 U. S. 199 (1960), when a new procedural rule casts doubt upon the reliability of a substantial proportion of past convictions obtained without its protections, we have required the new rule be given full retroactive effect. *Williams* v. *United States, ante,* at ——. From this it follows *a fortiori* that a decision holding certain conduct beyond the power of government to sanction or prohibit must be applied to prevent the continuing imposition of sanctions for conduct engaged in before the date of that decision. For the decision does far more than cast doubt upon the reliability of the guilt-determining process. It makes the question of reliability irrelevant, for it establishes beyond peradventure that the government has no legitimate interest in punishing such conduct at all. See *Ex parte Siebold,* 100 U. S. 371, 376–377 (1880). Accordingly, it may no longer continue to punish it.

II

The dissent seeks to explain its view of this case on the ground that even after this Court has declared certain individual conduct beyond the power of government

to prohibit, the government retains "an interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity" by punishing those persons who engaged in constitutionally protected conduct before it was so declared by this Court. *Post,* at [5]. This argument, of course, has nothing whatever to do with the rule of *law.* It exhalts merely the rule of judges by approving punishment of an individual for the *lèse-majesté* of asserting a constitutional right before we said he had it. In light of our frequent reiteration that the usual mode of challenging an unconstitutional statute is *expected to be violation of the statute* and adjudication of the constitutional challenge in a criminal proceeding, see, *e. g., Douglas* v. *City of Jeannette,* 319 U. S. 157, 163 (1943); *Dombrowski* v. *Pfister,* 380 U. S. 479, 484–485 (1965), it is difficult to see how this argument amounts to more than a flat statement that those who assert their constitutional rights before we have declared them may not do so with impunity.

If the dissent today means what it says, it would appear to follow that Virginia might keep in jail interracial married couples whose only offense was cohabitation within the State, so long as the cohabitation was prior to *Loving* v. *Virginia,* 388 U. S. 1 (1967); or that Arkansas could still discharge school teachers who taught evolution before we struck down the relevant statute in *Epperson* v. *Arkansas,* 393 U. S. 97 (1968). Of course the dissenters would never uphold such action. But if there is any distinction between these cases and the case at bar, it can be only that Angelini is asserting his privilege against self-incrimination, rather than a right under the First or Fourteenth Amendment. Whatever may be the relevance of the source of a new constitutional

rule in determining the extent to which it affects the reliability of the factfinding process at trial, however, there is no justification for allowing the government greater power to vindicate its nonexistent interest in enforcing an unconstitutional statute that punishes assertion of the privilege against self-incrimination than to vindicate its interest in enforcing a statute that punishes the assertion of any other constitutional right.

APPENDIX

Our cases show little deviation from the principle that new constitutional rules of criminal procedure which affect the integrity of the factfinding process will, in general, be retroactively applied. In *Tehan* v. *Shott*, 382 U. S. 406 (1966), we denied retroactive effect to *Griffin* v. *California*, 380 U. S. 609 (1965), despite our recognition that the privilege against self-incrimination which *Griffin* protected did in some circumstances serve as an adjunct to truth. 382 U. S., at 414–415 n. 12, quoting *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964). But in *Tehan* we noted specifically that the privilege against self-incrimination is not primarily "an adjunct to the ascertainment of truth," 382 U. S., at 416, and emphasized as well that retroactive application of *Griffin* would, in the States concerned, "have an impact upon the administration of their criminal law so devastating as to need no elaboration." *Id.*, at 419. Similarly, in *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), we denied retroactive effect to *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), notwithstanding our recognition that the principles announced in those cases would in some circumstances guard against the possibility of unreliable confessions. 384 U. S., at 730. But we emphasized in *Johnson* that strict pre-*Miranda* standards were available to those desiring to test the admissibility of confessions, *id.*, as well as pointing out the severe impact that retroactivity would have on state criminal processes. *Id.*, at 731–732. In *Stovall* v. *Denno*, 388 U. S. 293 (1967), we denied retroactive effect to *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), because of uncertainty about the frequency with which violation of the rule there announced would actually result in injustice, the availability of a due process standard to remedy at least the more serious injustices, and the "unusual force of the countervailing considerations."

Stovall v. *Denno*, 388 U. S., at 299. Finally, in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), we denied retroactive effect to *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), holding respectively that the States must afford criminal defendants a jury trial on demand in serious criminal cases, and that the right to jury trial extends to trials for serious criminal contempts. As to *Duncan*, retroactivity was denied because we considered that there was little likelihood that bench trials, as a whole, would be unfair, and because retroactive application could in some States reopen every conviction for serious crime. 392 U. S., at 633–634. As to *Bloom*, we recognized that one ground for the result was "the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt." *Id.*, at 634. But the firm tradition of nonjury trials in contempt cases, combined with the adverse impact of retroactivity on the administration of justice, combined to persuade us that *Bloom* should be applied prospectively only. *Id.*, at 634–635. In addition, it should be noted that this Court has not been hesitant to reverse contempt convictions because of the possibility of involvement on the part of the judge. See *Mayberry* v. *Pennsylvania*, — U. S. — (1971), and cases cited.

Examination of these cases, therefore, indicates that in all cases save *DeStefano/Bloom*, we regarded as relatively small the likelihood that noncompliance with the new rule would have resulted in serious injustice in any past cases. Moreover, in all cases save *Tehan* and *DeStefano/Duncan*, alternative methods were still available to those who could demonstrate that the feared injustice had in fact resulted. Taken in combination, these factors lead me to conclude that the cases discussed in this Appendix do not undercut the force of the proposition at issue.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1970

United States, Petitioner, *v.* United States Coin and Currency, Etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice White, with whom The Chief Justice, Mr. Justice Stewart, and Mr. Justice Blackmun join, dissenting.

I

None of Angelini's rights under the Fifth Amendment were violated when this forfeiture proceeding was begun and concluded in the District Court. In violation of the Internal Revenue Code, Angelini had failed to register as a gambler and to pay the related gambling tax; he was subject to criminal penalties for the default; and *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), had specifically held that the statutory obligation to file and pay was not compulsory self-incrimination proscribed by the Fifth Amendment. The Amendment at that time afforded Angelini no defense either to a criminal charge for refusal to register and pay or to a forfeiture proceeding based on the same offenses.

After affirmance of the forfeiture judgment in the Court of Appeals, however, our decisions in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968), intervened. *Kahriger* and *Lewis* were overruled. Obligatory filing and payment were held violative of the Fifth Amendment. It followed that failure to comply with the statute thereafter could not be punished by law. Angelini now claims the

benefit of the new constitutional doctrine announced by *Marchetti-Grosso*.

Of course we are not free to set aside convictions or forfeitures at will. The forfeiture judgment imposed here must stand unless the Constitution otherwise commands. More specifically, we are empowered to set aside the judgment only if we are constitutionally compelled to give *Marchetti* and *Grosso* retroactive application.

It is now firmly settled that the Constitution does not require every new interpretation of the Bill of Rights to be retrospectively applied. The cases from *Linkletter* v. *Walker*, 381 U. S. 618 (1965), to *Williams* v. *United States*, *ante*, p. ——, prove at least this much. They also squarely hold that retroactive sweep of newly announced constitutional doctrine is not required where violation of that doctrine raises no substantial doubts about the factual accuracy of guilty verdicts rendered under previous law. But if the new rule is such that its nonobservance in the past casts substantial doubt on the reliability of prior convictions, all prior verdicts involving such a violation must be set aside regardless of countervailing arguments about the impact on state and federal interests in maintaining criminal judgments.

So far, the Court and I are apparently in complete agreement. But I cannot join the Court in its disposition of this case. The majority's reasoning is simple: If we are required to apply retroactively any new constitutional interpretation casting serious doubt on the accuracy of prior verdicts, we are also compelled to set aside convictions or penalties based on conduct which subsequent decisions—expressly contrary to prior decisions of this Court—hold to be constitutionally protected. If verdicts may not stand where the new rule casts doubt on the integrity of prior trials, surely, it is

argued, a judgment such as the one against Angelini must be set aside because there should never have been a trial at all.

But this approach is no more than a beguiling verbalism. There is no doubt in this case that Angelini failed to register, file his returns, and pay his tax; nor is there any suggestion that either Angelini's conviction or the instant forfeiture proceedings were in any way unfair or departed from controlling norms. The argument here is not that new constitutional insight raises doubts whether Angelini committed the acts giving rise to the forfeiture or the accuracy of the procedures employed in determining whether he acted as charged; rather, it is that the forfeiture judgment must be set aside because based on conduct which *Marchetti-Grosso* have declared to be constitutionally immune. As Angelini would have it, complete retroactivity must always be given to decisions invalidating on constitutional grounds any substantive criminal statute. Any statute defining criminal conduct, if declared unconstitutional, is void *ab initio*.

I fail to find any such command, express or implied, in the Fifth Amendment or in any other provision of the Constitution. Nor does the Court care to explain the result it reaches. It does not embrace the theory that the Constitution must be understood always to have meant what the Court now says it means. It does not deny that this Court makes constitutional law. Nor does it assert that prior interpretations of the Constitution were never valid law and must always be disregarded. But apparently a statute making certain conduct criminal, once invalidated here, was never the law although this Court formerly held that it was and had regularly affirmed convictions under it over explicit constitutional challenge. I am not prepared to agree with this proposition.

II

Had Angelini registered and paid the federal tax and then been tried prior to *Marchetti-Grosso* for violating federal interstate gambling laws or state laws making gambling a crime, the admissions contained in his registration and gambling tax returns would have been relevant and presumptively reliable evidence of guilt, properly admissible under *Kahriger* and *Lewis*. And if after *Marchetti-Grosso*, Angelini had complained about the use of this evidence, *Tehan* v. *Shott*, 382 U. S. 406 (1966), and *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966), would surely dictate denial of relief whether Angelini came here on direct review of his conviction or from denial of collateral relief.

If we would not upset a conviction where Angelini registered and filed tax returns and these filed statements were used against him in a criminal prosecution, neither should we implement the *Marchetti-Grosso* reading of the Fifth Amendment by applying it where there has been no self-incrimination but a conviction or forfeiture for failure to register or pay the tax. In *Mackey* v. *United States*, *ante*, it seems to me that a major predicate for permitting Mackey's gambling tax returns to be used against him in a criminal prosecution was that those returns were not compelled admissions—that Mackey's Fifth Amendment rights were not violated by the statutory requirement to register, file returns, and pay the gambling tax, for that issue was controlled by *Kahriger* and *Lewis*, not by *Marchetti* and *Grosso*. Angelini is in no better position than was Mackey to argue successfully that the registration statute was invalid when he decided to ignore it or that the statute called for "compelled" incriminating admissions. To urge that the integrity of the forfeiture proceeding against Angelini is destroyed because *Mar-*

chetti-Grosso forbade any forfeitures at all is merely to reassert or assume that those decisions must be given retroactive effect. In terms of implementing the purpose of *Marchetti* and *Grosso* and the Fifth Amendment, I see no difference between convictions or forfeitures for noncompliance with the statute and those obtained by using the fruits of compliance with that same statute. Angelini's funds were validly and accurately forfeited for failing to file his returns contrary to a statute which this Court had upheld as consistent with the Fifth Amendment. Relief to Angelini would merely remove retroactively a burden on conduct, which when judged by current cases, was an exercise of his self-incrimination privilege, but which when it occurred and under the then-controlling law was a breach of duty he was legally bound to perform.

III

It is true that if this judgment of forfeiture were affirmed the law would countenance a penalty for past criminal acts that are wholly innocent under the current law. It is also true that when the law no longer censures certain acts, the Government surrenders its interest in deterring prior delinquents or the public generally from engaging in a particular form of conduct that once was criminal but is now unobjectionable behavior. But there remains the interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity. Clearly, the Constitution does not require the authorities to vindicate this interest upon the demise of a criminal law and some of us may think it unwise to do so. But is the interest so insubstantial that the Constitution forbids a State or the Federal Government from continuing to punish behavior which was once but is not now criminal conduct? I think not.

The question is an old one for both courts and legis-

latures and my answer is not novel, either in the context of the repeal of a criminal statute or in the context of a court decision overruling a prior case with respect to the constitutionality of a statute.

The common law never attached complete retrospectivity to the repeal of a criminal statute. Absent statutory guidance, the judge-made rule was that those whose convictions had been finally affirmed when repeal took place received no benefit from the new rule; but repeal of a statute abated pending prosecutions and required reversal of convictions still on appeal when the law was changed. *Chambers* v. *United States*, 291 U. S. 217 (1934); *Massey* v. *United States*, 291 U. S. 608 (1934); *United States* v. *Tynen*, 11 Wall. 88 (1870); *Yeaton* v. *United States*, 5 Cranch 281 (1809); *In re Kline*, 70 Ohio St. 25, 70 N. E. 511 (1904); *State* v. *Addington*, 2 Bailey (S. C.) 516, 23 Am. Dec. 150 (1833); *Ex parte Andres*, 91 Tex. Crim. 93, 237 S. W. 283 (1922); see also I Sutherland, Statutory Construction § 2046 (1943 ed.).

The courts nevertheless honored provisions in repealing statutes saving prosecutions and forfeitures for conduct committed while the former statute was in effect. *The Irresistible*, 7 Wheat. 551 (1822); I Sutherland, *supra*, § 2050. Moreover, in 1871, Congress enacted the following general statute which, among other things, saved ongoing criminal prosecutions from abatement following repeal of a penal statute:

> ". . . the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 16 Stat. 432 (1871).

This section was carried forward and eventually broadened by amendment "to provide that the expiration of a temporary statute shall not have the effect of preventing prosecution of an offense committed under the temporary statute" by making "applicable to violations of temporary statutes the same rule that is now in effect in respect to offenses against statutes that have been repealed." H. R. Rep. No. 261, 78th Cong., 1st Sess. 1 (1943).[1] Today, 46 States, as well as the Federal Government, make provision for saving pending criminal prosecutions from the repeal of the underlying statute.[2]

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[1] In a letter to the Speaker of the House of Representatives in support of this broadening amendment, Attorney General Biddle referred to the common-law rule as a "deficiency [which] has been cured as concerns offenses cognizable under a statute that has been expressly repealed, as distinguished from one that expires by its own terms." See H. R. Rep. No. 261, 78th Cong., 1st Sess. 1 (1943). He then indicated that there was doubt about whether the general saving provision identical to that enacted in 1871 (by then 1 U. S. C. § 29) applied to violations of temporary statutes that expired before prosecutions could be concluded. The Attorney General next stated that a number of wartime statutes of a temporary nature had been enacted, and that to forestall questions about their enforceability after expiration "it appears desirable to enact legislation which would expressly permit prosecutions after the lapse of such temporary statutes for violations committed while the act is in force." H. R. Rep. No. 261, *supra*, at 2.

[2] The 46 States are: Alabama: Ala. Code Tit. 1, § 11 (1958); Alaska: Alaska Stat. § 01.05.021 (1962); Arizona: Ariz. Rev. Stat. Ann. § 1–249 (1956); see also *id.*, §§ 1–244, 1–246, 1–247; Arkansas: Ark. Stat. Ann. § 1–103 (1947); California: Cal. Govt. Code § 9608 (West 1966); Colorado: Colo. Rev. Stat. Ann. § 135–1–7 (1963); Connecticut: Conn. Gen. Stat. § 54–194 (1968); Florida: Fla. Const. Art. 10, § 9; Georgia: Ga. Code Ann. § 26–103 (1953); Hawaii: Hawaii Rev. Laws § 1–14 (1968); Idaho: Idaho Code Ann. § 67–513 (1947); Illinois: Ill. Ann. Stat. c. 131, § 4 (Smith-Hurd 1953); Indiana: Ind. Ann. Stat. §§ 1–303, 1–307 (1967); Iowa: Iowa Code Ann. § 4.1 (1) (1967); Kansas: Kan. Stat. Ann. § 77–201 (1969); Kentucky: Ky. Rev. Stat. § 446.110 (1962);

The prevailing legislative policy and positive law thus is that neither the repeal of a statute nor the expiration of a temporary act shall release or extinguish penalties, forfeitures, or liabilities incurred under statutes no

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Louisiana: La. Rev. Stat. Ann. § 24:171 (1969); Maine: Me. Rev. Stat. Ann. Tit. 1, § 302 (1964); Maryland: Md. Ann. Code Art. 1, § 3 (1957); Massachusetts: Mass. Gen. Laws Ann. ch. 4, § 6 (1966); Michigan: Mich. Stat. Ann. § 2.214 (1969); Minnesota: Minn. Stat. § 645.35 (1967); Mississippi: Miss. Code Ann. § 2608 (1957); Missouri: Mo. Rev. Stat. § 1.160 (1959); Montana: Mont. Rev. Codes Ann. § 43–514 (1961); Nebraska: Neb. Rev. Stat. § 49–301 (1968); Nevada: Nev. Rev. Stat. § 169.235 (1968); New Hampshire: N. H. Rev. Stat. Ann. § 21:38 (1955); New Jersey: N. J. Rev. Stat. § 1:1–15 (1937); New Mexico: N. M. Const. Art. 4, § 33; New York: N. Y. Gen. Constr. Law § 94 (McKinney 1951); North Carolina: N. C. Gen. Stat. §§ 164–4, 164–5 (1964); North Dakota: N. D. Cent. Code § 1–02–17 (1959) [saves penalties, fines, liabilities, or forfeitures incurred under a repealed statute and provides that the repealed act remains in force for the purpose of enforcing such fines, penalties, or forfeitures; however, unless the repealing statute expressly provides otherwise, in cases tried both before and after the repeal, the repealing statute has the effect of "extinguishing any jail or prison sentence that may be, or has been, imposed by reason of said law . . . ." *Ibid.*; but see *In re Chambers*, 69 N. D. 309, 285 N. W. 862 (1939), where the court held that insofar as § 1–02–17 purported to extinguish prison sentences imposed after trial which preceded the effective date of the repealing statute, the section was unconstitutional under N. D. Const. § 76, which vests power to pardon in the Governor and the board of pardons]; Ohio: Ohio Rev. Code Ann. § 1.20 (Page 1969); Oklahoma: Okla Const. Art. 5, § 54; Oregon: Ore. Rev. Stat. § 161.040 (1967); Rhode Island: R. I. Gen. Laws Ann. § 43–3–23 (1957); South Dakota: S. D. Compiled Laws Ann. § 2–14–18 (1967); Tennessee: Tenn. Code Ann. § 1–301 (1955); Utah: Utah Code Ann. § 68–3–5 (1968); Vermont: Vt. Stat. Ann. Tit. 1, § 214 (1970 Supp.); Virginia: Va. Code Ann. § 1–16 (1960); Washington: Wash. Rev. Code § 10.01.040 (1956); West Virginia: W. Va. Code Ann. § 2–2–8 (1966); Wisconsin: Wisc. Stat. Ann. § 990.04 (West 1958); Wyoming: Wyo. Stat. Ann. § 8–21 (1957).

Of the four other States, Delaware has a provision but it applies only to save prosecutions for any offenses committed under laws

longer in force. Conduct perfectly innocent under current law is nevertheless punishable if it occurred while a valid criminal statute proscribed it. The courts have regularly enforced 1 U. S. C. § 109, the federal saving statute, never suggesting that it was constitutionally infirm or even fundamentally unfair and frankly recognizing that the Government is free to maintain the integrity of the law by insisting that those who violate it suffer the consequences.[3]

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repealed when the State's comprehensive Code of 1953 was adopted. Del. Code Ann. Tit. 1, § 104 (1953). See also Pa. Stat. Ann. Tit. 46, § 596 (1969), a general saving provision applicable only to repeal of "civil provisions." However, under Pa. Stat. Ann. Tit. 46, § 582, if the repeal of a penal statute is accompanied by a re-enactment at the same time of the repealed law's provisions in "substantially the same terms," a prosecution will be saved. See *Commonwealth* v. *Davis*, 4 D. & C. 2d 182, 56 Lack. Jur. 146 (1956). Tex. Pen. Code Art. 14.16 (1948), provides: "The repeal of a law where the repealing statute substitutes no other penalty will exempt from punishment all persons who may have violated the repealed law, unless it be otherwise declared in the repealing statute." But Tex. Pen. Code Art. 17.19 saves prosecutions for offenses committed under statutes repealed when the new Penal Code took effect. South Carolina apparently has no general saving provision applicable to criminal prosecutions.

[3] *United States* v. *Reisinger*, 128 U. S. 398 (1888) (enforcing one of the predecessors of 1 U. S. C. § 109); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 553–555 (1954); *Morehead* v. *Hunter*, 198 F. 2d 52 (CA10 1952); *Lovely* v. *United States*, 175 F. 2d 312, 316–318 (CA4 1949); *Rehberg* v. *United States*, 174 F. 2d 121 (CA5 1949); *Ladner* v. *United States*, 168 F. 2d 771 (CA5 1948). I Sutherland, Statutory Construction, § 2048 (1943 ed.). See also *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 119 (1947); *Duffel* v. *United States*, 221 F. 2d 523 (CADC 1954); cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 331–333 (1936); *United States* v. *Hark*, 320 U. S. 531 (1944) (reversing an order quashing an indictment charging violation of maximum price regulation that had been revoked prior to the date the indictment was returned on the ground that the statute under which the regulation was issued remained in effect after revocation).

In *Chambers* v. *United States*, 291 U. S. 217 (1934), this Court was faced with the question of what effect repeal of the Eighteenth

Of course, the case before us does not involve the legislative repeal of an existing criminal statute but a construction of the Fifth Amendment by this Court

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Amendment by the Twenty-first Amendment on December 5, 1933, would have on criminal prosecutions continued or begun under the National Prohibition Act after the repealing amendment had been ratified. In an opinion by Chief Justice Hughes, the Court applied the common-law rule of *Tynen* and *Yeaton* and held that pending prosecutions, including those still on direct review, would be abated. The question of whether the Twenty-first Amendment had any effect on convictions which had become final before the date of ratification was specifically reserved. 291 U. S., at 226. Thereafter, the courts of appeals held that defendants whose convictions had become final before the Twenty-first Amendment was ratified had to serve their sentences. *United States ex rel. Randall* v. *United States Marshal*, 143 F. 2d 830 (CA2 1944); *Odekirk* v. *Ryan*, 85 F. 2d 313 (CA6 1936); *United States ex rel. Cheramie* v. *Dutton*, 74 F. 2d 740 (CA5 1935), cert. denied *sub nom. United States ex rel. Cheramie* v. *Freudenstein*, 295 U. S. 733 (1935); *Rives* v. *O'Hearne*, 73 F. 2d 984 (CADC 1934); *Moss* v. *United States*, 72 F. 2d 30 (CA4 1934); *The Helen*, 72 F. 2d 772 (CA3 1934) (common-law rule of *Chambers* applied to a forfeiture); *United States ex rel. Benton* v. *Hill*, 72 F. 2d 826 (CA3 1934); *United States ex rel. Voorhees* v. *Hill*, 72 F. 2d 826 (CA3 1934); *United States ex rel. Nerbonne* v. *Hill*, 70 F. 2d 1006 (CA3 1934).

In *Chambers*, the Court rejected the Government's suggestion that the general saving provision—the predecessor of § 109—supported the continuation of prosecutions pending when the repealing amendment was ratified. The saving statute was discussed as passed in recognition of the principle that unless a repealed law is "continued in force by competent authority," 294 U. S., at 224, repeal halts enforcement. Congress had the power to propose the Twenty-first Amendment so as to include a saving provision, but not to vary the Amendment's terms once it was adopted. Since as adopted the Amendment gave Congress no power to extend the operation of the National Prohibition Act, which was deprived of its force by the action of the people in repealing the Eighteenth Amendment, the Court concluded that the general saving provision had no application. *Ibid.*

There can be no doubt that a court which had just decided *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), would consider the judiciary as "competent authority"

contrary to past interpretations of that Amendment and having the effect of barring enforcement of § 7203 against those refusing to register as gamblers and pay the gambling tax. As to those persons, at least those failing to file and pay after January 29, 1968, § 7203 may not constitutionally be enforced. Does such a declaration concerning a law which this Court had previously validated mean that the law was to this extent void from the moment it was enacted? If so, it would appear that not only should pending prosecutions abate, but also all previous convictions should be vulnerable to habeas corpus petitions alleging that petitioners are in custody pursuant to an unconstitutional law. Or should the statute validated by prior Court decisions be considered a valid law until the date of its invalidation and its demise treated as Congress treats the repeal of a statute?

Neither of these alternatives has found unqualified support in this Court. There are statements in the cases indicating that an unconstitutional law must be treated as having no effect whatsoever from the very date of its enactment. *Chicago* v. *Hackett,* 228 U. S. 559 (1913); *Norton* v. *Shelby,* 118 U. S. 425 (1886); *Ex parte Siebold,* 100 U. S. 371, 376 (1880).[4] But this view has not prevailed. In *Gelpcke* v. *City of Dubuque,* 1 Wall. 175, 206 (1863), the city issued bonds pursuant to legislative authorization which the Iowa Supreme Court had upheld as constitutional. The same court then overruled itself and held the statutory authorization to be

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to fashion a rule that a statute, though changed by interpretation, nevertheless remained in force and applicable to events which transpired before the change occurred. See nn. 6–7, *infra,* and accompanying text.

[4] In *Norton,* Mr. Justice Field declared:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 118 U. S., at 442.

void. This Court refused to allow the state court to give retroactive effect to the overruling decision by invalidating the bonds, saying that the legislature could not impair the obligation of an existing contract and that the same principle applies "where there is a change in judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court." [5]

Great Northern R. Co. v. *Sunburst Oil and Refining Co.*, 287 U. S. 358 (1932),[6] was another indication that

[5] The Court so held over the dissent of Mr. Justice Miller who said:

"The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859." 1 Wall., at 211.

See also *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 492 (1900); *Douglass* v. *County of Pike*, 101 U. S. 677, 687 (1879).

[6] *Sunburst* rejected the claim that a state court could not constitutionally refuse to make its ruling retroactive. Mr. Justice Cardozo held:

"A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly, that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision

the Court clearly rejected any all-inclusive principle of retroactivity for court decisions declarative of a change in the law. In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371 (1940), this Court was faced with the question whether retroactive effect should be accorded an earlier decision declaring a federal statute unconstitutional. *Ashton* v. *Cameron County District,* 298 U. S. 513 (1936). Referring expressly to *Norton,* Chief Justice Hughes stated that the broad language in that opinion "must be taken with qualifications." 308 U. S., at 374. As he asserted:

> "The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of a subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Ibid.*

This clear rejection of the idea that every decision declaring a statute unconstitutional had retroactive sweep

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is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." 287 U. S. 358, at 364–365 (citations omitted, footnotes omitted, emphasis in original).

was one of the underpinnings of *Linkletter* v. *Walker*, 381 U. S. 618, 622–629 (1965), and has been invoked since *Linkletter*.[7] It was against this background that this Court has fashioned rules to deal with the impact on pending and closed criminal cases of decisions that overruled prior decisions construing the various provisions of the Bill of Rights. And it is against this background that I would reverse the judgment of the Court of Appeals.

[7] See *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204, 213–215 (1970); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); cf. *Tehan* v. *Shott*, 382 U. S. 406 (1966), where the prosecutor's comment about the defendant's failure to take the stand was authorized, when made, by Article I, § 10 of the Constitution of Ohio and Ohio Rev. Code § 2945.43.